Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1162

JONES TRANSFER COMPANY,
CENTRAL TRANSPORT, INC.
AND U.S. TRUCK COMPANY, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA, ET AL.,
Respondents. [1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Jones Transfer Company, Central Transport, Inc., and U.S. Truck Company, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 29, 1977.

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[1] Respondents to this petition are: United States of America and Interstate Commerce Commission; Rocky Mountain Motor Tariff Bureau, Inc., Southern Motor Carriers Rate Conference, Inc., and Middle Atlanti: Conference, intervenors in support of respondents below, and Ford Motor Company and the National Industrial Traffic League, petitioners below.

ORDERS AND OPINIONS BELOW

The judgment and opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. (3a)[2] The initial report and order of the Interstate Commerce Commission, *Detention of Motor Vehicles – Nationwide*, 124 M.C.C. 680 (15a), was decided May 12, 1976. A second report and order of the Commission on reconsideration, *Detention of Motor Vehicles – Nationwide*, 126 M.C.C. 803 (135a), was decided June 3, 1977. A third order of the Commission, as yet unpublished, was issued September 14, 1977 (165a). All of said orders are included in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered December 29, 1977, and this petition for a writ of certiorari has been filed within 90 days of that date. This court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in construing this Court's opinion in *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), as precluding any meaningful inquiry by a reviewing court into the existence of a stated reasoned basis for agency action or the absence of a rational connection between agency findings and the ultimate remedies adopted?

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[2] References to the consolidated appendix which has been submitted by these petitioners and other petitioners seeking review of the proceedings below are given as "___a".

2. Did the Interstate Commerce Commission act arbitrarily and capriciously in promulgating rules that constructively bar common motor carriers from delivering freight to the consignees in those circumstances where the motor carriers make use of temporary parking areas at the facilities of the consignees, where the agency failed to articulate a reasoned basis for its decision and, where in particular the basis articulated by the agency is demonstrably erroneous on the record below?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 5

Section 706 – Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

* * * * *

(2) Hold unlawful and set aside agency action, findings and conclusions found to be —

(A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * * * *

United States Code, Title 49

National Transportation Policy (49 U.S.C. preceding Sections 1, 301, 901, 1001)

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; — all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Code of Federal Regulations, Title 49

Section 1307.35(e) (2) (Proposed)

Section 2. Definitions

* * * * *

(f) "Spotting" means the placing of a trailer at a specific site designated by consignor, consignee, or other party designated by them, detaching the trailer, and leaving the trailer in full possession of consignor, consignee, or other designated party unattended by carrier's employee and unaccompanied by power unit. Carrier will not move the trailer until such time as it has received notification pursuant to Section 3, that the trailer is ready for pickup at any site on premises. Consignor, consignee, or other designated party may shift the spotted trailer with its own power units at its own expense and risk for the purpose of loading or unloading. Empty trailers placed at the premises of consignor without specific request are not spotted until the carrier receives a consignor's request and places a trailer for spotting. Movement of the trailer from the consignor's premises to the specific site for spotting shall be the obligation of the carrier, and free time shall accrue as provided in section 3.

STATEMENT OF THE CASE

Under notice and comment rulemaking procedures pursuant to Section 553 of the Administrative Procedure Act, 5 U.S.C. §553, the Interstate Commerce Commission promulgated uniform rules to regulate detention of motor common carrier vehicles by shippers and receivers (consignees) of freight. One of these rules, Section 2(f), defined circumstances under which a motor carrier trailer will be deemed "spotted" at the facilities of a consignee. Under Section 2(f), a trailer is spotted when it is detached from its power unit and left in the full possession of the consignee. The impact of such spotting is that the carrier's line haul transportation service is deemed to be at an end, and its delivery is deemed completed.

In its decision adopting these rules, the Commission took the position that *any* detachment of a trailer on the property of a consignee would cause a trailer to be "spotted". (73a, 139a, 168a) Such a construction would apply even in a situation where a carrier was merely using a consignee-owned parking area to detach trailers from its over-the-road tractors, for subsequent delivery by other tractors under its control. Under the Commission's interpretation of Section 2(f), any such temporarily detached trailer would be considered spotted, even where the carrier retained possession of the trailer, and the carrier's transportation service would terminate. A consignee would thus be required to secure its own carrier service to have such a trailer moved to the desired point of unloading, or else pay an additional delivery charge to the delivering carrier.

Such a rule will result in needless and wasteful conversion of motor carrier operations to a so-called "live" delivery system. At present, petitioners and many other carriers temporarily detach their trailers in consignee parking areas ("holding yards") to allow their locally-based equipment to make actual deliveries. Such detachment frees over-the-road equipment to perform other highway operations while actual delivery of detached trailers is performed by one switching tractor. The alternative, use of road equipment to make actual deliveries, unnecessarily causes skilled drivers with costly highway equipment to sit idle at consignee facilities waiting for their vehicles to be unloaded. By imposing added delivery costs on consignees when trailers are temporarily detached, Section 2(f) economically compels consignees to require live deliveries. Evidence adduced before the Commission indicated that a substantial shift to such inefficient live deliveries will occur if the proposed rule becomes effective.

The holding yards presently used by motor carriers at consignee facilities are parking areas controlled by the carriers themselves or their agents. (J.A. 29)[3] Consignee involvement in these facilities is limited to providing security services. (J.A. 30) When a carrier brings a loaded trailer into a holding yard for delivery, it notifies the consignee of the availability of the trailer for delivery and unloading and leaves the trailer in the possession of its agent. (J.A. 30) When the consignee advises that it can accept delivery, the agent then moves the trailer from

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[3] References to the administrative record in the Joint Appendix before the Court of Appeals below are given as "J.A.".

the holding yard to the actual point of unloading. To avoid having trailers unduly detained while awaiting consignee unloading, carriers publish provisions charging the consignee for the length of time the trailer is detained. (J.A. 29) As soon as notice of arrival is given, the consignee is allowed a stated free time period for unloading and then is charged on an hourly or daily basis for additional detention time. Trailers parked in holding yards are always subject to the running of such detention charge provisions; no free storage is provided to the consignee. (J.A. 31)

Section 2(f) arose from the Commission rulemaking proceeding in Ex Parte No. MC-88, *Detention of Motor Vehicles – Nationwide*. The central focus of this proceeding was the detention of all types of motor carrier vehicles by shippers and consignees for the purpose of loading or unloading. (117a) In addition to the detention provisions applicable in holding yards, carriers generally assess charges against shippers or consignees for any detention of trailers or power units delayed in loading or unloading.The Commission's primary concern in initiating its rulemaking proceeding was the need for promulgating uniform rules for the assessment of such charges, with the attendant elimination of discrimination between shippers in the assessment of such charges. (17a-18a) A related concern was whether all carriers should be required to publish "pre-arranged scheduling" provisions in their detention rules, whereby shippers or receivers could make appointments for the arrival of carrier vehicles and not be charged for detention if such vehicles arrived ahead of schedule.

Section 2(f), and the Commission's interpretation of that section, further none of the Commission's stated goals in promulgating detention rules. Rather, the Commission has used Section 2(f) to require the imposition of extra transportation charges on consignees receiving freight through holding yards, by ruling that such trailers have been spotted and thus finally delivered when they are parked at the carrier holding yard. However, after three Commission reports and a voluminous underlying record, there is still a complete absence of any basis, factual or legal, to justify this ruling. This is a case in which

——the Commission's own language in Section 2(f) fails to support the conclusion in the Commission reports that trailers in carrier holding yards must be deemed spotted,

——each of the Commission reports states that trailers in carrier holding yards should *not* be considered spotted, in juxtaposition to contrary statements in the same reports,

——Commission counsel on appellate brief below advanced a position directly opposite to statements of the Commission itself that trailers in holding yards are not spotted, and

——the only rationale supporting the Commission's constructive ban on holding yards is founded on totally baseless factual premises.

It is difficult to fathom an administrative record that could be less supportive of an agency's ultimate conclusions.

As noted, Section 2(f), on its face, does not consider a trailer spotted and thus terminate line haul service unless

the trailer is left "*in the full possession of the * * * consignee * * * unattended by carrier's employee.*" (Emphasis added) However, in its reports adopting Section 2(f), the Commission has specifically stated that *all* trailers left in holding yards are deemed spotted. The Commission states:

> The definition of "spotting" contained in Section 2(f) and item 33 on page 737 [73a] of the prior report and order make it clear that the carriers' line-haul obligation ends when a loaded trailer is dropped in the consignee's holding yard. The cost of moving the trailer from the holding yard to the unloading dock is the responsibility of the consignee. (168a)

As noted, holding yards are attended by carrier employees, and trailers in holding yards remain in the carriers' possession. Accordingly, the finding that all trailers in holding yards are "spotted" is inconsistent with the plain language of Section 2(f). Indeed, the Commission's interpretation takes the unusual step of holding that a carrier's service is deemed completed even before the carrier has given up possession of its freight. Nevertheless, the Commission has continued to adhere to the view that Section 2(f) makes all trailers left in holding yards spotted and thus subject to no further carrier movement.

Even the adopting reports of the Commission itself contain statements that trailers left in carrier-supervised holding yards should not be considered spotted. Under the proposed rules, trailers which are not spotted are subject to delivery under the terms of the so-called "detention with power" rules. (154a-158a) (as opposed to the "detention without power" rules which apply to spotted trailers. 158a-161a) Such rules apply to the

delivery and holding of trailers which remain in the possession of a carrier or its agent. At numerous points, the Commission reports state that, as holding yards are operated by carriers, trailers left in holding yards are still in the carrier's possession and thus are subject to the rules for detention with power. For instance, in its first report, the Commission stated:

> If the carrier must leave the vehicle in a holding yard arrangement with either itself or its agent moving the trailers, then any accrued detention is subject to the charges for vehicles with power units, * * *. (73a)

Similarly, the Commission stated in its second report that:

> Lower charges for detention without power are based on the economies which carriers realize by not having drivers and power units tied up in unproductive waiting time. These economies are lost when a carrier must either return a tractor to the yard to shuttle a trailer, or pay an agent to do so. (139a)

These statements are in direct contradiction to the Commission's concurrent statements that trailers in holding yards are deemed spotted. If trailers are spotted, they are subject to charges for detention without power. There is no indication in the Commission reports themselves as to which category of charges should actually be applicable.[4]

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[4] In its third report, the Commission also stated that a trailer left in an origin holding yard could not be deemed to be left in the full possession of a consignor, and thus spotted "because the carrier is free to move or even remove the trailer altogether". (166a) A carrier maintaining a destination holding yard would similarly be free to move trailers within the holding yard. Accordingly, by the Commission's logic, such trailers should similarly be considered not to be spotted.

Before the Court of Appeals, petitioners argued that even if the detention with power provisions were those applicable to trailers left in holding yards, the Commission had failed to justify the high level of charges called for by such provisions.[5] However, the Commission brief in no way responded to this argument. Rather, Commission counsel on brief chose to completely abandon any statements below suggesting detention with power provisions applied. The Commission brief stated:

> Contrary to Jones' assertion, spotted trailers which are shifted [from holding yards to unloading docks] *will not be subject to* charges for detention of motor vehicles with power * * *. (Joint Brief for the Interstate Commerce Commission and the United States, p. 27) (Emphasis added)

This statement completely contradicted the statement in the Commission's first report that:

> If the carrier must leave the vehicle in a holding yard arrangement with either itself or its agent moving the trailers, then any accrued detention *is subject* to the charges for vehicles with power units. (73a-74a) (Emphasis added)

[5] The level of detention charges for vehicles with power was prescribed by the Commission based on a combination of Commission average cost figures and comparisons with existing levels of detention with power charges. The result of applying detention with power charges would be to assess virtually confiscatory detention charges for trailers spotted at holding yards. Detention with power charges are $432.00 per trailer per day, over 17 times as high as the initial charge for trailers without power. The cost figures used to develop the charges for detention with power are full labor and investment costs for a continuously-present tractor, trailer, and driver. (58a) Such charges bear no relation to the holding of upwards of 40 trailers in a holding yard manned by only one employee and one small yard tractor unit. The Commission clearly did not have holding yard operations in mind when it formulated the level of charges for detention with power. Indeed, such charges would be confiscatory, and no shipper or receiver of freight would utilize holding yards with such charges in being.

Neither of the Commission's first two reports advanced any explanation of what public interest would be served by a policy that would treat parking of a trailer in a carrier controlled holding yard as a spotting and final delivery, so as to force a consignee to pay an added charge to obtain an actual delivery of its freight. Only in the Commission's third report is a policy justification advanced to support the Commission's position. According to the third report, holding yards are discriminatory devices, aimed at allowing large shippers to avoid the payment of detention charges on parked trailers. (168a) The Commission stated that loaded and empty trailers "should not have to wait hours and days in limbo before free time toll" (169a) and that petitioners proposed a "convenient holding yard arrangement" with "little or no likelihood of incurring detention charges". (168a) Such a finding ignored the fact that both shippers and carriers had repeatedly stated that detention charges begin to run as soon *as a trailer has been placed in the holding yard*. (J.A. 31, 61, 1230, 882, 906) Indeed, petitioners urge assessment of the same level of detention charges against the consignee as proposed by the Commission, covering the same detention period. Petitioners oppose only the termination of carrier line haul service at the point of temporary holding. Thus, the Commission's justification is based on a completely erroneous factual premise. Further, a Commission comment that large shippers served from holding yards had greater control over deliveries than smaller shippers served by live deliveries (168a) ignored the fact that such advantage had been specifically eliminated

by the Commission's first report requiring that all consignees be provided with deliveries on pre-arranged schedules. (46a) The discrimination found to exist had already been eliminated by another provision of the detention rules. Thus, the only justifications advanced by the Commission for a policy against service through holding yards were completely lacking in any factual basis.

Accordingly, the adoption of Section 2(f) as construed by the Commission is based solely on the bare conclusion that an added cost burden should be imposed on consignees who receive freight through a holding yard delivery system. The Commission made no study of whether the cost of such a delivery system was any greater than the cost of making live deliveries. Indeed, the only evidence of record showed that carrier costs were *less* when a holding yard system was used. (J.A. 887-890) Rather, the Commission concluded that added charges must be imposed on consignees served through holding yards even if it were established that holding yards offered a positive benefit in carrier convenience. (73a) Again, no justification was advanced for an argument that would require consignees to pay *more* for a service which would cost the carriers *less*.

The requirement of an extra charge for delivery of a trailer after placement in a holding yard is directly contrary to established Commission precedent. As urged before the Commission, in *Carrier Switching at Industrial Plants in the East*, 294 I.C.C. 159 (1955), the Commission permitted the nation's rail carriers to move cars from temporary holding sites to delivery locations as a part of their line haul service. The specific justification for this ruling was the Commission's finding that motor carrier

line haul service *included* such deliveries from temporary holding yard areas. (294 I.C.C. at 167) However, the Commission below disclaimed this precedent without explanation, stating merely that the *Carrier Switching* case was "not analogous". (73a)

Following exhaustion of their administrative remedies, petitioners sought judicial review of the Commission's adoption of Section 2(f). In a *per curiam* opinion filed December 29, 1977, the Court of Appeals denied the petition for review. (3a) The sole basis for the court's denial was its interpretation of this Court's opinion in *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972). The Court of Appeals stated that *Allegheny-Ludlum* "severely limits the extent of judicial review". (9a) It noted that the Commission's treatment of the issues had been "laconic", and that the Commission's conclusions bore little relation to the rulemaking record developed in these proceedings. (10a) At no point did the court indicate where the Commission had articulated a reasoned basis for its actions, or specify what rational connection existed between the Commission's findings and its ultimate conclusions. However, relying solely on *Allegheny-Ludlum*, the court concluded that "the Commission's findings and conclusions 'are rationally supported'." (11a) The words "rationally supported" were placed in quotation marks in the court's opinion, indicating the degree to which the court felt its powers circumscribed by the *Allegheny-Ludlum* decision.

REASONS FOR GRANTING THE WRIT

The decision of the Third Circuit below has improperly read *Allegheny-Ludlum* as barring any meaningful inquiry by a reviewing court into the existence of an articulated and reasoned basis for an administrative agency decision. *Allegheny-Ludlum* is not a "severe limitation" on the standard of judicial review, as found by the Third Circuit. Rather, *Allegheny-Ludlum* itself, subsequent decisions of this Court, and subsequent decisions of the Courts of Appeals, require a full inquiry by reviewing courts as to whether an agency decision was based on a thorough consideration of relevant factors, whether an agency has genuinely engaged in reasoned decision making, and whether there has been a clear error in agency judgment. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-416 (1971); *F.P.C. v. Texaco*, 417 U.S. 380, 395-96 (1974); *Bowman Trans. v. Arkansas-Best Freight*, 419 U.S. 281, 285 (1974); *F.P.C. v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976). In failing to find adoption of Section 2(f) arbitrary and capricious, the opinion of the Third Circuit is squarely in conflict with these decisions, and with many decisions of other circuits. The Third Circuit has clearly misconceived and misapplied the precedent set forth in *Allegheny-Ludlum*. *Compare*, *Wilkinson v. United States*, 365 U.S. 399, 401 (1961). In holding that placement of trailers in a carrier holding yard constitutes a final delivery, and requires the payment of an additional charge in order to effect the actual delivery, the Commission reports below prescribe a policy which is

(1) contrary to the plain meaning of the actual rule being adopted,

(2) contrary to statements contained in the reports themselves,

(3) so inconsistent that certain portions of the reports were directly contradicted in the Commission's brief to the Court of Appeals,

(4) based on a completely erroneous understanding of present detention charge assessment in holding yards, and

(5) at odds with prior decisions of the Commission and this Court.

Accordingly, the Third Circuit failed to apply a proper judicial standard in affirming this decision of the Commission.

1. There is no basis for the conclusion of the Court below that *Allegheny-Ludlum* constitutes a severe limitation on the extent of judicial review. While the quoted language in the opinion below (9a-10a) may suggest such a limitation, a complete reading of *Allegheny-Ludlum* shows a clear reaffirmance by this Court of established judicial functions in the review of administrative agency decisions. The portion of the *Allegheny-Ludlum* opinion at 406 U.S. 749-755 contains a detailed analysis of the underlying facts, findings, and conclusions of the agency below. *Allegheny-Ludlum* specifically adopts the well established requirement of a rational relationship between the agency's ultimate conclusions and the factual bases in the record upon which the agency relied. (406 U.S. at 755-756) *Allegheny-Ludlum* affirms the established precept of judicial review that an agency must adequately explain its departure from prior norms and sufficiently spell out the basis of its legal decision. (406 U.S. at 756) Further,

Allegheny-Ludlum reviews the rationality of agency action in light of the underlying conditions determined in the course of agency rulemaking proceedings. (406 U.S. at 753)

Neither the subsequent decisions of this Court nor the subsequent decisions of Courts of Appeals have interpreted *Allegheny-Ludlum* as requiring a narrowed scope of judicial review. The subsequent decision of this Court in *F.P.C. v. Texaco*, 417 U.S. 380 (1974), specifically reiterates that courts must make positive determinations as to whether agencies have exercised their statutory discretion in rulemaking, and that agency decisions may not be sustained merely on the basis of post-hoc rationalizations of counsel. (417 U.S. at 396, 397) District courts and courts of three circuits have cited *Allegheny-Ludlum* as an appropriate standard for judicial review and remanded agency rulemaking proceedings for lack of adequate explanation of agency findings or lack of rational basis for agency action. *B.F. Goodrich Company v. Department of Transportation*, 541 F. 2d 1178 (6th Cir., 1976); *cert den.* 430 U.S. 930 (1977); *Alabama Association of Insurance Agents v. Board of Governors*, 533 F. 2d 224 (5th Cir., 1976); *South Terminal v. E.P.A.*, 504 F. 2d 646 (1st Cir., 1974); *Chemical Leaman Tank Lines, Inc. v. United States*, 368 F. Supp. 925 (D. Del., 1973); *Ann Arbor Railroad Co. v. United States*, 358 F. Supp. 933 (E.D. Pa., 1973). Other courts, while affirming agency actions, have cited *Allegheny-Ludlum* as mandating a broad standard of judicial review of agency action. *Dallas City Packing, Inc. v. Butz*, 411 F. Supp. 1338 (N.D. Tex., 1976); *Florida East Coast Railway Co. v. United States*, 368 F. Supp. 1009 M.D. Fla., 1973); *Ann Arbor Railroad Co. v. United States*, 368 F. Supp.

101 (E.D. Pa., 1973). The severely limited view of judicial review set forth by the Third Circuit in the proceeding below is directly in conflict with the standards of review applied in these cases.

The only basis for the divergent standard applied by the Third Circuit would appear to be that judges of that circuit were those reversed by this Court's opinion in *Allegheny-Ludlum*. *Allegheny-Ludlum Steel Corporation v. United States*, 325 F. Supp. 352 (W.D. Pa., 1971). Indeed, such reversal is noted in the opinion below. (10a) However, the mere fact of specific reversal imposes no different standard on a court below than that applicable to all inferior courts. *Cf. Norton v. McShane*, 332 F.2d 855 (5th Cir., 1964), *cert. denied* 380 U.S. 981 (1965). The Third Circuit was obliged only to observe the general precedent of *Allegheny-Ludlum*, rather than imposing any unduly narrow standard as a result of the prior reversal by this court.

2. The decision of the Commission should be found to be arbitrary and capricious, within the meaning of 5 U.S.C. §706. The position taken in the Commission reports is one which is inconsistent with the actual rule adopted in such reports, directly contrary to specific statements in these reports, founded on totally non-existent factual premises, and completely contrary to prior Commission precedents. Further, on brief before the Court of Appeals, Commission counsel took a position directly opposite to that stated in the reports of the Commission below. Any proper application of the standards of judicial review should find the Commission's action to be arbitrary and capricious.

Initially, the policy announced in the Commission's decision does not comport with the plain meaning of the pertinent rule being adopted. The Commission's policy,

as announced in its three reports, is that placement of a loaded trailer in a temporary holding yard constitutes a "spotting" of the trailer which brings the carrier's line haul obligation to an end. (73a, 139a, 168a) However, the adopted rule itself, Section 2(f), states that spotting may only be deemed to occur when a trailer is left "in full possession of the * * * consignee * * * unattended by carrier's employee." As holding yards are operated by carrier employees or agents, trailers placed in holding yards can in no way be deemed spotted within the plain meaning of Section 2(f). It is clear that the statements of the Commission in its adopting report are binding on parties to this proceeding, even though such statements do not appear on the face of the adopted rule itself. *Consolidated Flower Shipments, Inc. v. CAB*, 213 F. 2d 814, 818 (9th Cir., 1954); *Freight Consolidators Cooperative, Inc. v. United States*, 230 F. Supp. 692 (S.D. N.Y., 1964). However, where an agency urges a strained and unnatural construction of a promulgated rule, considerations of notice and clarity place a heavy burden on the agency to justify the inconsistencies between the rule and accompanying explanation. *F.P.C. v. Texaco*, 417 U.S. 380, at 395 (1974). At very minimum, the Commission's proposed rule and its adopting order are so inconsistent as to be patently ambiguous and lacking in the standard of clarity which administrative orders must exhibit. *Id.* at 396.

Secondly, the Commission reports themselves are patently inconsistent in their varying statements as to the provisions applicable to the detention of trailers in holding yards. The Commission reports variously state that trailers are considered spotted and the carriers' line haul delivery obligation is considered ended when trailers are parked in holding yards. (73a, 139a, 168a) At other

points, the Commission reports state that trailers left in holding yards will not be considered spotted, but rather, that the Commission's detention with power provisions would apply to allow for a full delivery under line haul rates. (73a, 139a, 166a) Again, it is impossible to tell what result is intended by the Commission, or upon what basis, if any, the Commission has chosen one alternative construction over the other. It is not the function of a reviewing court to resolve inconsistencies in an agency decision. *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943); *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-68 (1962). With such patent inconsistencies as to what the Commission actually intended in this proceeding, the Commission decisions clearly may not be sustained.

Thirdly, rather than dealing with potential defects in the record which would be occasioned by a conclusion that the Commission's detention with power rules applied to trailers placed in holding yards, the Commission counsel on appellate brief made a determination to abandon those statements in the Commission reports suggesting that detention with power provisions apply. Such an abandonment was never indicated in any of the Commission reports, but rather, was a completely unsupported action by counsel. Post-hoc attempts to rationalize agency decisions cannot be accepted where a rational basis is not provided in the decision of the agency itself. *Burlington Truck Lines v. United States, supra* at 371 U.S. 156, 168-69 (1962). Even a reviewing court is without power to sustain an agency action based on findings or reinterpretations which an agency *might* have made. *S.E.C. v. Chenery Corp., supra* 318 U.S. 80, at 94. Obviously, agency counsel are similarly not empowered to make such determinations for the agency itself.

The Commission's only explanation of its policy reasons for its interpretation of Section 2(f) is based on completely erroneous factual premises. The Commission was completely in error in stating that present holding yard practices allow trailers to remain "in limbo" without the tolling of detention charge provisions. (169a) There is no support in the record for such a conclusion. To the contrary, petitioners and many other parties indicated that detention charges do apply to trailers placed in temporary holding yards. To the extent that an agency relies on record matter in informal rulemaking, it is obliged to relate its ultimate conclusions to the matter developed on the record. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *F.P.C. v. Texaco*, 417 U.S. 380, 396 (1974); *National Association of Food Chains, Inc. v. I.C.C.*, 535 F. 2d 1308 (D.C. Cir., 1976); *Tanners' Council of America v. Train*, 540 F. 2d 1188, 1193 (4th Cir., 1976); *Hooker Chemicals & Plastics Corp. v. Train*, 537 F. 2d 620 (2nd Cir., 1976). There is no basis in this record for rationalizing Section 2(f) as an anti-discriminatory device.

The Commission's decision essentially reduces to a mere general conclusion that consignees whose freight is being delivered through the temporary parking of trailers in holding yards should pay an extra transportation charge. There are no underlying findings of fact to support such a conclusion, and no discussions as to why such a conclusion is warranted. To the extent that cost evidence was submitted pertaining to holding yard delivery service, the evidence showed that such service was less expensive than live delivery service, rather than representing any sort of "extra" operation. (J.A. 887-890) In any event, costs apparently did not play a part in the Commission's decision to impose an extra charge, as it

stated that such charges would be imposed even where holding yards served the convenience of the carriers. (73a) Further, the Commission completely brushed aside motor carrier concerns that the Commission's policies would compel consignees to require inefficient live deliveries. The Commission's only response was that holding yards could continue if consignees were willing to pay extra charges. (168a) Accordingly, the Commission's decision to impose such a charge is a mere conclusion, unsupported by any record justification or analysis.

Lack of such justification is particularly significant where, as here, Commission precedent holds that deliveries from temporary holding yards are included within motor carrier line haul service. The Commission's 1955 *Carrier Switching* decision unequivocally stated that motor carrier line haul service *included* movement of trailers to unloading sites after temporary placement in parking areas. *Carrier Switching at Industrial Plants in the East, supra*, 294 I.C.C. 159, at 167 (1955). This rule is also contained in numerous other Commission decisions, including *Hygrade Food Products Corp. Terminal Allowance*, 306 I.C.C. 557, 559 (1959) and *Medusa Portland Cement Co. Terminal Services*, 287 I.C.C. 57, 62 (1952). It is a sharp departure from past decisions to reverse such a conclusion and hold that temporary parking effects a termination of line haul service. *Compare Atchison T. & S.F.R. Co. v. Board of Trade*, 412 U.S. 800, 807-8 (1973); *Secretary of Agriculture v. United States*, 347 U.S. 645, 653 (1954)[6]. The

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[6] Indeed, the Commission's rule has always been that it will not allow a separate charge for what had formerly been a part of line haul service absent a finding of the reasonableness of charges for both the separated service and the remaining line haul service. *Atchison T. & S.F.R. Co. v. Board of Trade, supra*, at 412 U.S. 800, 809 (n. 6), and cases cited therein.

Commission's bare finding that the *Carrier Switching* case was "not analogous" falls far short of this Court's requirement that "the ground for departure from prior norms * * * must be clearly set forth so that the reviewing court may understand the basis of the agency's action." *Atchison T. & S.F.R. Co. v. Board of Trade, supra*, at 412 U.S. 800, 808 (1973).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: February 16, 1978

Supreme Court, U. S.
FILED
FEB 16 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-~~77~~-1162

JONES TRANSFER COMPANY, *ET AL.*,
Petitioner,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,
Petitioner,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

FORD MOTOR COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITIONERS' JOINT APPENDIX TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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APPENDIX A

OPINION OF

COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1977, 77-2093 and 77-2095

FORD MOTOR COMPANY,
Petitioner in No. 77-1977

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., MIDDLE ATLANTIC CONFERENCE,
Intervenors

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,
Petitioner in No. 77-2093

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION
Respondents

MIDDLE ATLANTIC CONFERENCE, SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.,
Intervenors

JONES TRANSFER COMPANY; CENTRAL TRANSPORT, INC.; EARL C. SMITH, INC.; INTER-CITY TRUCKING SERVICE, INC.; OGDEN & MOFFETT COMPANY; U.S. TRUCK COMPANY, INC.; and WHITE STAR TRUCKING, INC.,
Petitioners in No. 77-2095

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents

PETITION FOR REVIEW FROM THE INTERSTATE COMMERCE COMMISSION
(ICC Ex Parte No. MC-88)

Argued December 6, 1977

Before: ALDISERT and WEIS, *Circuit Judges*, and CHRISTENSEN, *District Judge*.*

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OPINION OF THE COURT

(Filed December 29, 1977)

PER CURIAM

Various petitions for review have been consolidated to present the question whether certain orders of the Interstate Commerce Commission in Ex-Parte No. MC-88, *Detention of Motor Vehicles Nationwide,* 124 M.C.C. 680 (1976); 126 M.C.C. 803 (1977), reflect conclusions that "are rationally supported", *United States v. Allegheny-Ludlum Steel Corp.,* 406 U.S. 742, 749 (1972). Because we are persuaded that there is a rational basis for the ICC conclusions, we will deny the relief sought in the petitions for review.

The Ford Motor Company (No. 77-1977) petitioned this court for judicial review of the Commission's reports and orders in Ex-Parte No. MC-88, dated May 25, 1976, June 3, 1977, and September 15, 1977. The National Industrial Traffic League (NITL) (No. 77-2093) and the Jones Transfer Company (No. 77-2095), a group of seven motor common carriers, filed petitions for review in the District of Columbia and the Sixth Circuits, respectively. Both of these petitions were transferred to this court pursuant to 28 U.S.C. § 2112(a). The Rocky Mountain Motor Tariff Bureau, the Middle Atlantic Conference and the Southern Motor Carriers Rate Conference, Inc., have intervened as respondents in the litigation.

The orders under attack promulgate uniform nationwide motor truck and trailer detention regulations providing for prearranged scheduling and detention charges for vehicles with and without power. The rules are separate from and independent of the line-haul transportation charges. In general, the rules provide for and define free and chargeable detention time of vehicles with power—trucks and tractors—as well as vehicles without power—trailers. The basic purpose of the rules, according to the ICC, is to discourage undue delay of motor carrier equipment by shippers and their representatives. According to the Commission, non-uniform detention rules, published by all the major rate bureaus and the individual rate carriers, contain numerous, highly specific exceptions which can act as a subterfuge for creating preferences, concessions and rebates.

The orders appealed from emanated from lengthy rulemaking proceedings that began on June 22, 1973, and culminated in a report and order dated May 25, 1976, a report and order on reconsideration dated June 3, 1977, and an order granting petitions for reconsideration and modification dated September 15, 1977. The Commission rules provide for detention of motor vehicles with and without power and vest in the consignees or consignors of freight the discretion to decide where carriers can detach their power units. The rules define spotting as "the placing of a trailer at a specific site designated by consignor, consignee, or other party designated by them, detaching the trailer, and leaving the trailer in full possession of consignor, consignee, or other designated party unattended by carrier's employee and unaccompanied by power unit." § 2(f), 124 M.C.C. at 793. The rules further provide, *inter alia,* that the consignee or the consignor may designate any site on its premises, including the loading dock, as the place to spot trailers, and may provide "holding yards" on their premises for parking trailers. Additionally, the rules state that when a carrier's line-haul obligation ends, the

cost of moving the trailers to the loading dock is the responsibility of the consignee or consignor.

I.

Ford and Jones Transport challenge only the orders regulating the detention of trailers. The NITL challenges not only these orders, but also the Commission's findings regarding the charges and the burden of proving responsibility for delay of carrier equipment.

Ford argues that the orders were arbitrary, capricious, and not in accordance with law, and that insofar as they restrict the legal line-haul responsibility of the common carrier by motor vehicle, the orders are unsupported by substantial evidence. Jones Transport contends that the Commission acted arbitrarily and capriciously (a) in failing to relate the ban on holding yard operations to any interest of the shipping public in reducing detention of motor vehicles, and in requiring without justification a conversion of carrier operations to inefficient pick up and delivery methods; (b) in attempting to redefine the scope of line-haul motor carrier service without analyzing the function of holding yards in providing such service, the past history and precedents relating to such service, and the historic equities between motor common carriers and other transportation modes; (c) in barring all motor common carrier participation in inbound switching of trailers; and (d) in barring carrier switching operations in the delivery of freight at destination, while allowing switching in the pick up of freight at origin.

NITL contends that the ICC abused its discretion by prohibiting motor common carriers from switching loaded trailers from holding yards to unloading facilities as part of their line-haul obligation, arguing that it arbitrarily and capriciously ignored evidence of record which established that trailer pools are mutually beneficial to shippers and carriers and are not a concession to large shippers and, moreover, that the rule requiring common carriers to de-

liver freight short of the consignees' unloading facilities is inconsistent with applicable law. NITL also contends that the ICC arbitrarily and capriciously established a uniform detention charge without reference to motor carrier costs or the purposes which the charge is intended to serve, and that the shift in the burden of proving responsibility for delay of carrier equipment is inconsistent with the nature and purpose of detention.

II.

The starting point for judicial review of the ICC orders is 5 U.S.C. § 706(2)(A): "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." But we do not write on a clean slate in fashioning a construction of what is arbitrary and capricious in the context of reviewing ICC *rulemaking* functions. The Supreme Court has specifically and definitively addressed this aspect of statutory construction, and has formulated a scope and standard that severely limits the extent of judicial review:

> The standard of judicial review for actions of the Interstate Commerce Commission in general, *Western Chemical Co. v. United States*, 271 U.S. 268 (1926), and for actions taken by the Commission under the authority of the Esch Act in particular, *Assigned Car Cases*, 274 U.S. 564 (1927), is well established by prior decisions of this Court. We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported. In judicially reviewing these particular rules promulgated by the Commission, we must be alert to the differing standard governing review of the

Commission's exercise of its rulemaking authority, on the one hand, and that governing its adjudicatory function, on the other:

> In the cases cited, the Commission was determining the relative rights of the several carriers in a joint rate. It was making a partition; and it performed a function quasi-judicial in its nature. In the case at bar, the function exercised by the Commission is wholly legislative. Its authority to legislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general. *Assigned Car Cases, supra,* at 583.

United States v. Allegheny-Ludlum Steel Corporation, supra, 406 U.S. at 748-49.

Were we able to utilize a more expansive notion of what is "arbitrary, capricious, and an abuse of discretion", we might have been receptive to some of the arguments presented by the petitioners. *See, e.g., Allegheny-Ludlum Steel Corporation v. United States,* 325 F. Supp. 352 (W.D. Pa. 1971) (*reversed,* 406 U.S. 742 (1972). For it can be said with some confidence that the ICC's discussion of some of the points raised by the petitioners was, at best, laconic. What the three judge court noted in *Allegheny-Ludlum Steel, supra,* may have special pertinence here: "We are puzzled that a seven-year study by that Commission, which included a fifty-day hearing before an examiner with a record amounting to 6,000 pages, was climaxed by a spartan, one sentence finding . . . ." 325 F. Supp. at 355.

Nevertheless, measuring the present petitions against the appropriate standard of judicial review, we conclude

that the Commission's findings and conclusions "are rationally supported". And to the extent that evidence was required in the record to support the contested conclusions, we find it sufficient to sustain the exercise of the ICC's rulemaking authority.

Accordingly, the several petitions for review will be denied.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U. S. Courts, International Printing Co., Phila., Pa.)

APPENDIX B

REPORTS AND ORDERS

OF THE

INTERSTATE COMMERCE COMMISSION

Served May 25, 1976

M-12776

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. MC-88

DETENTION OF MOTOR VEHICLES-NATIONWIDE

EX PARTE NO. MC-88

DETENTION OF MOTOR VEHICLES-NATIONWIDE

Decided May 12, 1976

Upon investigation, uniform nationwide truckload and volume detention rules for vehicles with power and for vehicles without power including prearranged scheduling and uniform nationwide charges adopted. Table of contents in appendix VI.

Paul F. Beery, Donald E. Cross, Charles E. Dye, Henry L. Fabritz, Frank B. Hand, William C. Harris, E. Stephen Heisley, Thomas M. Hummer, William J. Jones, Kenneth L. Kessler, Robert H. Kinker, Edward R. Kirk, M. Craig Massey, Richard A. Peterson, H. Ray Pope, Michael L. Reed, B. M. Shirley, Jr., John MacDonald Smith, M. W. Smith, and *James R. Ziperski* for individual motor carriers.

Robert E. Born, James R. Boyd, Fred G. Favor, John S. Fessenden, Michael Gallagher, Robert G. Gawley, Jon F. Hollengreen, William E. Kenworthy, F. H. Lynch, Jr., Michael May, John W. McFadden, Jr., Norman Powell, Warren A. Rawson, Bryce Rea, Jr., Louis Rezek, J. Alan Royal, Ambrose A. Such, and *James E. Wilson* for motor carrier associations and rate bureaus.

Ralph H. Bell, Jacob P. Billig, Charles A. Brock, Harry E. Colwell, Richard B. Cortland, Thomas D. Donis, C. F. Forgue, H. Richard George, Carl L. Haderer, S. J. Jablonski, Terrence D. Jones, N. J. Jordan, Ernest H. Land, David R. Larrouy, E. C. Marlin, Thomas F. McGrath, Frederick W. Mild, U. S. Reininger, Frank M. Thoma, Jack R. Turney, Jr., Walter Vashak, and *Alan F. Wohlstetter* for individual shippers.

Arthur A. Arsham, Stanley W. Brown, V. Alice Campbell, John M. Cleary, John F. Donelan, D. G. Donovan, James F. Hickox, Ronald K. Kolins, Gerald E. Peck, Myron Smith, Martin S. Snitow, Peter J. Sullivan, Richard T. Tobey, Kenneth P. Tubbs, William G. Wagstaffe, and *Charles A. Washer* for shipping associations.

Richard T. Brownell, Camillo A. D'Ambrosio, Phillip Grossman, David R. Hall, S. Kawakami, William Weinberg, and *Joe S. Yearby* for the Department of Defense.

Francis X. Davis, Leonard A. Salters, Maurice J. Street, and *Harold S. Trimmer, Jr.,* for the General Services Administration.

Warren I. Cohn and *Bernard A. Gould* for the Bureau of Enforcement, Interstate Commerce Commission.

James L. Pimper for the Federal Maritime Commission.

Paul M. Donovan, Patrick J. Falvey, Samuel H. Moerman, F. A. Mulhern, and *Arthur L. Winn, Jr.,* for The Port Authority of New York and New Jersey.

Herbert Alan Dubin for the International Association of Refrigerated Warehouses, Inc.

Robert H. Moeller, Jr., for Ramcon, Inc.

Arthur L. Fox, II for the Professional Drivers Council for Safety and Health.

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

This rulemaking proceeding was instituted on our own motion under authority of part II of the Interstate Commerce Act, 49 U.S.C. §301 et seq. (1970) including sections 203(b), 208(a), 216(b) and (d), 217(a), (b), and (d), and 222(c) thereof, and pursuant to the Administrative Procedure Act, §§4 and 10, 5 U.S.C. §§553 and 559 (1970) to determine whether the facts and circumstances require or warrant the adoption of the proposed regulations set forth in appendix IV, or other regulations of similar purport applicable to motor common carriers of property operating in interstate or foreign commerce subject to the Interstate Commerce Act, and for the purpose of taking such other and further action as the facts and circumstances may justify or require.

I. GENERAL INTRODUCTION

The origin of this rulemaking proceeding lies in both shipper and carrier complaints alleging unjust and unreasonable practices, unjust discrimination, preference and prejudice, as well as unlawful concessions and rebates with regard to the scheduling and detention of vehicles and various related matters. Additionally, a number of inquiries have been received asking whether arrangements for prearranged schedules—a practice which is related to detention—may be made without provision therefor being published in applicable tariffs lawfully on file with this Commission.

To consider these and related matters, a Notice of Proposed Rulemaking and Order (hereinafter Notice) was entered May 22,

1973, instituting this proceeding.[1] The Notice invited comments on five specific issues.[2] It indicated oral hearing was not contemplated unless a need therefor should later appear, and named as respondents all motor common carriers subject to the Interstate Commerce Act except those transporting exclusively: (1) household goods, (2) commodities in bulk in tank trucks, (3) heavy and specialized commodities or articles requiring special handling, and (4) articles picked up from or deliveried to railroad cars having prior or subsequent transportation by rail. The Notice also authorized and directed the Commission's Bureau of Enforcement to participated and invited any other interested persons to participate in this proceeding through the submission of written statements of facts, views, and argument on the subjects mentioned above, or on any other subjects pertaining to this proceeding.

II. The Representations

Initial responses to our Notice have been received from 69 parties either individually or in groups.[3] Representations have been received from those parties listed in appendix I of this report and order. The representations submitted have defined many questions concerning the five issues and the proposed rule. They have assisted the Commission in developing an extensive record in this proceeding enabling us to make an informed and comprehensive decision. As a result, we believe we can promulgate workable uniform regulations of nationwide scope that are consistent with the public interest and the national transportation policy declared by Congress. A detailed summary of the comments of the parties in this proceeding is attached as appendix II.

[1] See appendix IV, infra.

[2] "(1) [T]he need for requiring all motor common carriers of property subject to the jurisdiction of this Commission to published and maintain their tariffs and file with this Commission uniform rules—nationwide—to govern the assessment and collection of vehicle detention charges applicable on interstate shipments moving subject to volume, truckload, less-than-truckload, or any quantity rates; (2) the need for requiring the publication of provisions therein requiring prearranged schedules to be established for the pickup and delivery of such shipments as a part of uniform vehicle detention rules; (3) if prearranged schedules are necessary, whether such provisions are necessary with respect to (a) volume shipments, (b) truckload shipments, (c) less-than-truckload shipments, and (d) any quantity shipments or any one or more of these four categories of shipments; (4) the lawfulness of carriers and shippers or receivers entering into voluntary prearranged schedules for the pickup and delivery of interstate shipments without tariff provisions authorizing such arrangements having first been published in tariffs lawfully on file with the Commission; and (5) the level of vehicle detention charges to be assessed and collected for such service."

[3] A breakdown of this figure indicates that 16 initial responses are from shippers, 2 from combinations of shippers, 12 from shipper associations, and 1 from a combination of shipper

(footnote continued on next page)

Shipper participants in this proceeding largely favor the establishment of a uniform nationwide truckload and volume detention rule. They generally base their support on the need for standardarization, simplification, and elimination of abuse. Most oppose the establishment of a less-than-truckload (LTL) and any quantity (AQ) detention rule, contending that such a rule is impractical and that LTL rates are already higher to account for the proportionately greater time required for such pickups and deliveries. More shippers favor prearranged scheduling than oppose it, and the same may be said for a uniform nationwide detention charge.

The Department of Defense (DOD), the General Services Administration (GSA), and the Commission's Bureau of Enforcement generally support the proposed rule with prearranged scheduling as a means of increasing efficiency and eliminating unfair practices.

Aside from those motor carrier interests requesting exclusion, a majority opposed prescription of the proposed truckload detention rule and particularly the proposed LTL rule contending that: need has not been demonstrated, a competitive disadvantage will be foisted on the industry, an administrative and enforcement quagmire will result, and the industry will be deprived of flexibility without a significant improvement in efficiency. Motor carrier interests were more united in their opposition to uniform nationwide charges. They claimed that the Nation was too diverse for a single charge to reflect regional and carrier cost difference and that this would deprive carriers of their traditional managerial discretion in ratemaking.

III. Preliminary Matters

Southern Motor Carriers Rate Conference, Inc. (SMC) seeks to correct its initial statement in which it makes a section-by-section comparison between the so-called "NARCO uniform rule for detention of vehicles with power units on truckload and volume shipments" and the proposed uniform rule. The Conference now admits to having erroneously asserted that the National Advisory

(footnote 3 continued)
associations; 16 initial responses are from carriers, 3 from combinations of carriers, and 10 from individual carrier associations and rate publishing bureaus, and 2 from combinations of rate bureaus; 3 initial responses are from governmental agencies; and one each from a warehouse association, a freight consolidator, and a drivers organization. Replies have been received from 20 respondents consisting of 3 shippers, 1 combination of shippers, 2 shipper associations, and 1 combination of shipper associations; replies were also received from 2 carriers, 1 combination of carriers, 7 carrier associations, 2 governmental agencies, and 1 warehouse association.

Rules Committee (NARCO), author of the rule in question, operated under the auspices of the National Motor Freight Tariff Association when, in fact, it is an advisory committee convened under the Motor Carrier Inter-Related Rate Agreement as approved by the Commission in section 5a, Application No. 72.

SMC's petition to correct is prompted by the joint reply statement of the Drug and Toilet Preparation Traffic Conference, Eastern Industrial League, Inc., and The National Small Shipments Traffic Conference, Inc. (D&TPTC et al.). These parties contend that the rules promulgated by both SMC and NARCO are unlawful and, therefore, do not warrant Commission recognition. The alleged unlawfulness of the rule arises because purportedly it was prepared and published in violation of the antitrust laws and without Commission authorization.

However, in reply to the SMC petition, D&TPTC et al. argue that the petition itself constitutes a reply to its reply in violation of rule 23 of the Commission's General Rules of Practice, and, in addition, note the absence of substantiating documentation and verification. Furthermore, D&TPTC et al. note the omission of any reference to NARCO within section 5a of Agreement 72, and that SMC failed lawfully to promulgate and publish the NARCO detention rule presently in effect for its participating carriers. For this reason, D&TPTC et al. request either a denial of the petition or, alternatively, that the Commission note the rule's unlawfulness and deny it consideration.

The contention that the petition constitutes a reply to a reply is rejected. A respondent is entitled to correct its statement when error is discovered provided others are not prejudiced thereby—as in the case at hand. Regarding the alleged unlawfulness of the SMC rule, the fact is that the actual rule was not put into evidence, but even if it had been, its lawfulness is clearly beyond the scope of this rulemaking proceeding.

With regard to the lawfulness of the NARCO rule, under the Inter-Related Agreement referred to by SMC, the signatory members who compose the major carrier collective ratemaking organizations, commonly known as rate bureaus, are authorized under article I, section 1.2 to "utilize technical and nontechnical committees and personnel to investigate and analyze any inter-rated rate matter for mutual information and guidance—all so as to more effectively discharge their obligations in the public interest and in furtherance of the National Transportation Policy." Thus, it is within

the member bureau's power to establish a committee to promote uniformity in rules, including detention rules. Notwithstanding this, respondent is entitled to introduce into a rulemaking any proposal that is relevant. The alleged unlawfulness of an alternative proposal in an antitrust or other context does not detract from the evidentiary quality of the proposal. SMC's request for correction is, therefore, granted.

Second, D&TPTC et al. move either to strike or have clarified certain data submitted by the Middle Atlantic Conference (MAC) in its reply statement and similar data submitted by Central & Southern Motor Freight Tariff Assoc., Inc., Central States Motor Freight Bureau, Inc., Niagara Frontier Tariff Bureau, and Rocky Mountain Motor Tariff Bureau, Inc. (Four Bureaus) in their joint reply statement. MAC employs certain data to show the liberality of the free time designated by the proposed rule. Specifically, MAC introduced a table based on line 7, schedule B of the Commission's Highway Form A, computing pickup and delivery costs at origin and destination for the Middle Atlantic region, showing the average man-minutes per ton required for various weight brackets at stops in 1967 and 1970. On a second table, showing three shipments weights, MAC used the data from its first table to compute the time required for the weights at stops in 1967 and 1970, and compared these times with corresponding free time provided under the proposed rule.

The Four Bureaus used comparable data to support their contention that significant regional differences exist in the time and costs involved in pickup and delivery service which purportedly militates against a uniform nationwide detention rule. Their table, using data derived from the same source as that of MAC, compares the man-minutes per ton required for various weight brackets at stops within the Pacific, Rocky Mountain, and South-Central regions in 1969 and 1970.

In their motion to strike, D&TPTC et al. contend that while such data is proper in initial statements, their use in reply statements in the present proceeding denies other parties the rebuttal they are entitled to pursuant the Administrative Procedure Act §7, 5 U.S.C. §556(d) (1970). Alternatively, D&TPTC et al. move for clarification—contending that the data is not entirely pertinent for comparison with the proposed rule's free times for detention of vehicles with power since it does not differentiate between vehicles with and without power nor between palletized and nonpalletized shipments.

Participant's motions lack merit. The data presented in both reply statements are in response to arguments raised by the parties in their initial statements and are, therefore, proper.

We also note that 5 U.S.C. §556(d) is not a bar to the assailed data. The rulemaking was instituted under and is governed by the provisions of 5 U.S.C. §553, which simply requires that interested persons be given notice and "an opportunity to participate in the rulemaking through submission of written data, views or arguments with or without opportunity for oral presentation."[4] Since this proceeding is a clear exercise of legislative rulemaking power[5] and the Interstate Commerce Act, does not require a determination "on the record," the adjudicatory provisions of 5 U.S.C. §556 are not applicable. Therefore, under 5 U.S.C. §553 participant has already been accorded an adequate opportunity for the submission of views through initial and reply statements and will not be prejudiced by a denial of its motions. Moreover, to delay the proceeding further on the basis of these motions would be unjustified and a disservice to the interests of the public. The above motions are, therefore, denied.

IV. Discussion and Conclusions

Issue One—The need for requiring all motor common carriers of property subject to the jurisdiction of this Commission to publish and maintain in their tariffs and file with this Commission uniform rules—nationwide—to govern the assessment and collection of vehicle detention charges applicable on interstate shipments moving subject to volume, truckload, LTL, or AQ rates.

Contentions of the Parties

Truckload and volume rates.—Supporters of a uniform nationwide truckload detention rule predict substantially improved transportation efficiency as a result of the rule's implementation. According to these parties, the institution of such a rule is expected to induce a more prompt release of carrier equipment because all consignees who use carriers' vehicles as auxiliary warehouses in lieu of building additional storage facilities will be subject to charges for such use. Moreover, it is anticipated that the rule will stimulate shippers to organize their operations in a conscientious effort to reduce the number of waiting trucks and accruing detention charges. Others expect the rule to foster maximum utilization of

[4]Administrative Procedure Act §4, 5 U.S.C. §553(b) and (c) (1970).

[5]See also, *United States* v. *Allegheny-Ludlum Steel*, 406 U.S. 742 (1972); *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224 (1973).

automated systems techniques in the publication, application, and policing of detention rules and charges. Thus, it is contended that prescription of a uniform nationwide truckload detention rule will result in the greater availability of vehicles and at the same time introduce greater economy into the transportation industry.

Shippers frequently cite the economy to be derived from the simplification of carrier tariffs on a nationwide basis. In addition to enhancing opportunities for automated systems techniques, it is believed that simplification applied uniformly and nationwide will facilitate shipper efforts to forecast and incorporate transportation costs into their own price structure more accurately. Such rules are also expected to ease the administrative expense and effort now resulting from the complexity and lack of uniformity in the diverse rules currently in effect. Thus, the Asphalt Roofing Manufacturers Association argues that a uniform rule will provide substantial efficiencies in simplifying carrier and shipper operations as well as shipper audit of freight charges.

Other shipper parties assert that replacing the present profusion of detention rules with one, clear, standarized rule should also lessen ambiguity, thereby reducing chances of misunderstanding between shippers, carriers, and their respective employees as to the interpretation and meaning of such rules. Additionally, it will terminate the anomalous existence of multiple rules governing identical performance at the same location as illustrated by General Mills, Inc., when noting the existence of four different interstate detention rules presently in effect in the Chicago area alone. Simplification, moreover, would eliminate the publication of numerous different, confusing, and inefficient detention rules in diverse or identical areas while halting the publication of rules replete with exceptions. A uniform nationwide rule allegedly will encourage more equitable and uniformly reasonable detention practices and charges with respect to all classes, types, and sizes of shippers.

Mitigation of enforcement problems is cited in justification of a uniform nationwide rule. The substitution of one, simplified, commonly understood rule for the current multiplicity of confusing and exception ridden rules, it is argued, should substantially reduce misunderstanding and consequently lessen enforcement problems. And while a single detention rule should ease the enforcement burden, the actual prescription of a uniform nationwide rule by the Commission assertedly will imbue a sense of immediacy to detention, and as a result become a more effective deterrent to

unlawful practices than the more general sections of the Interstate Commerce Act. Thus, the Department of Defense contends that the uniform rule will to some extent counter the ever-present potential for discrimination, preference, prejudice, concession and rebate by impeding the large shipper's ability to manipulate and pressure carriers into granting favorable treatment or reducing detention charges. This in turn should eliminate the numerous and often complicated detention rule exceptions that favor particular shippers or commodities as enumerated by the Bureau of Enforcement. Proponents agree that carrier flexibility to manipulate individual carrier traffic service to their particular revenue needs (as charged by the National Association of Food Chains) would be curtailed by the rule's implementation. D&TPTC et al., however, respond to contrary arguments advocating unlimited carrier flexibility and managerial discretion by asserting that such arguments are timeworn and not specific. In response, it questions how there can be any meaningful reasons to justify the severe differences existing in current detention rules.

Acme Markets, Inc., and D&TPTC et al. question how carriers can support the movement towards uniform terminal rules and uniform detention language while simultaneously opposing a single uniform nationwide detention rule. In refuting allegations that a prescribed rule would be too difficult and time consuming to revise, the Steel Carrier's Tariff Association, Inc., cites two instances where the Commission promptly responded to requested changes in the Middle Atlantic detention rule.

Some supporters of the uniform truckload detention rule cite reasons given in the Notice as justification for its adoption. Others refer to *Detention of Motor Vehicles—Middle Atl. & New England*, 325 I.C.C. 336, 340 (1965), for the proposition that a limited group of carriers cannot effectively maintain a detention rule either because of a lack of cooperation or for competitive reasons.

Opponents of the uniform nationwide truckload detention rule generally attack the institution and sufficiency of this rulemaking. The New England Motor Rate Bureau, Inc. (NEB), refers to the rulemaking as a "monstrous over-reaction" based only on undisclosed complaints that have not described such details as volume, type of commodity, area, or location of the complainant or carrier. Several opponents in their reply statements contend that the number of revealed complaints is relatively small and emphasize that a significant percentage are from the Middle Atlantic region where, they note, a prescribed detention rule has existed since

1965. Parties express disbelief and request that particular complaints appear in the record if they are so widespread. The joint reply statement of the Four Bureaus criticizes this rulemaking on the grounds that the development of so complex a rule with so many issues of necessity entails a great deal of time, difficulty, and experience for it to achieve its purpose. Because of such prerequisites, respondents conclude that the record developed is a woefully inadequate one on which to base prescription of a detention rule. Assertedly, thorough analysis was replaced by parties seeking either to isolate those subjects most important from their standpoint or to generalize in an overly vague fashion.

Rate bureaus contend that even if a need for a uniform rule had at one time existed, it has been obviated by progress voluntarily made in developing more uniform bureau detention rules. That differences should continue to exist they consider inevitable based on the Nation's diversity. These differences are not inherently unreasonable since there is no single lawful rule or charge, but rather a long-recognized zone of reasonableness within which a carrier's managerial discretion may operate. Criticism is widely leveled at the Commission's order of March 18, 1974, limiting this rulemaking to motor common carriers. Parties maintain that a resulting competitive disadvantage is being foisted on the motor common carrier because of the failure to include railroad trailer-on-flatcar (TOFC) service, freight forwarders, REA, private carriage and specialized motor carriers. An additional reason, jointly advanced by the Eastern Central Motor Carriers Association, Inc., and the Middlewest Motor Freight Bureau (ECA and MWB), for maintaining the present detention system is that special exceptions are required to aid motor common carriers in meeting the specific competitive situations presented by these alternative sources, and that only a bureau detention rule is sufficiently flexible for this purpose.

Much opposition to a uniform rule centers around the alleged necessity for a flexible system. Accordingly, it is argued that once established, a uniform rule would take too long and be too difficult to amend. SMC contends that if the formal Commission route has to be followed, even the slightest changes could require intensive litigation. Parties opposing a uniform rule argue that it will ignore differences inherent in various classes of motor common carriers, types of commodities, manner of transportation and equipment, as well as dissimilar nationwide economic and geographic conditions, such as character of the traffic, local needs, and local operating

conditions. The Pacific Inland Tariff Bureau (PITB) points to the exemptions and exceptions in the Middle Atlantic region to emphasize that uniformity is not obtainable even in just one region.

According to several parties, the concept of a uniform nationwide rule on detention violates the whole theory of the Interstate Commerce Act which provides for carrier initiation of both rates and policy. Thus, promulgation of the rule will assertedly force the Commission to inject itself into the tariff publishing business, a role for which it is neither equipped nor prepared. Moreover, these parties argue that the rule will not prevent unreasonable practices, discrimination, prejudice, preference, concessions, and rebates. Some carriers allude to the complaints still coming forth in the Middle Atlantic region as an indication that a uniform rule will not ensure observance nor remedy current detention problems. Enthusiastic enforcement of existing tariff detention rules under section 217(b) is deemed by several parties to be the best way to curb illegal practices.

Several parties also contend that a uniform rule is not the answer to greater efficiency. According to some there simply is no need for the rule. The American Retail Federation maintains that the rule will not maximize utilization of equipment, while ECA and MWB jointly contend that it will simply create numerous regulatory problems without solving any. Several shippers fear that carriers may consider the rule as merely providing an additional source of revenue, while a penalty element, if added, may even make detention profitable at the expense of efficiency. One party warns that a uniform rule may result in continual controversy or stultification, discouraging progress to greater efficiency while passing the added cost on to the Nation's commerce and public.

Other parties point out practical problems in implementing the proposed rule. For example, between the employees of carriers and shippers, a rule measuring detention charges by the quarter hour would lead to argument, confrontation, and ill will. Others contend that it will unfairly shift the detention burden to the shipper when in fact the most important element, the driver, is beyond the shipper's control, thereby permitting the onus of labor inefficiency and the carrier's loss of control over its labor to fall on the shipper. Several carriers complain that the reporting requirements already facing small- and medium-sized carriers are presently insufferable, even without a uniform rule. Others contend that the rule will punish the perishable food industry with regard to their spotting practices; and

both carriers and shippers point to its failure to account for palletized and partially palletized shipments.

LTL and AQ rates.—While many arguments used vis-a-vis the proposed uniform nationwide truckload and volume detention rule are also applicable to LTL and AQ, several opposing arguments are unique to LTL and AQ rates.

Several parties point out that LTL rates generally are significantly higher to reflect more costly handling and greater time required for LTL pickup and delivery. In comparison to truckload rates, D&TPTC et al. allege that LTL rates have increased disproportionately, to the extent of 30 to 40 percent since April of 1970, because of higher LTL costs, including pickup and delivery. Superimposing detention charges upon LTL rates is, therefore, considered an LTL rate increase since detention is already figured into the higher LTL rate.

It is also contended that the administrative expense and burden resulting from prescription of a uniform nationwide LTL and AQ detention rule would outweigh any benefit derived therefrom. The greater frequency of LTL shipments together with the detailed records and data to be required for relatively smaller charges and predictable collection problems assertedly militate against the adoption of a uniform LTL detention rule. Several parties single out for particular concern problems inherent in allocating free time and charges among LTL shipments. The administrative expense involved in the charge allocation alone is stated to be prohibitive. Moreover, aggregating weights to compute free-time allotments and charges could indiscriminately penalize shippers regardless of their efficiency. The Grand Union Company argues that aggregation will yield the quantity of time designed for a single shipment of the same weight whereas with weights being equal, several LTL shipments will unavoidably take significantly longer to unload and check than one truckload shipment.

Several respondents complain of inadequate free time, pointing out the substantial time consumed in merely backing the vehicle into position, sorting, and verifying the shipment against the bill of lading. Others contend that even more so than truckload shipments, LTL shipments are totally within the control of the carrier and especially the driver, that the nature of the service necessarily requires longer handling time, and that this longer handling time is often beyond the control of either party. The difficulties inherent in establishing prearranged schedules for LTL shipments is also widely cited as a basis for opposing a uniform nationwide LTL dentention rule.

CONCLUSION

In *Detention of Motor Vehicles—Middle Atl. & New England, supra,* the Commission found the maintenance of a uniform detention rule for determining motor common carrier detention charges to be "necessary for economical and efficient transportation service and * * * in the public interest." A uniform rule was prescribed for motor common carriers within Middle Atlantic territory and between that territory and New England territory, and with relatively few exceptions has been in effect since August 6, 1965. Subsequently, the Commission increased the exact charges for motor vehicle detention prescribed for MAC territory, and in doing so reaffirmed its above findings. *Detention of Motor Vehicles—Middle Atl. & New England,* 344 I.C.C. 333, 338-339 (1973). As set forth in the Notice, the purpose of this rulemaking is to determine whether a uniform *nationwide* detention rule is necessary for economical and efficient transportation service and in the public interest, and if so, the form it should take.

Truckload and volume rates.—Detention rules are neither recent nor unique innovations. Although modeled after demurrage, detention rules have developed a character of their own in order to meet specific needs in the motor common carrier industry; they are currently published by all major rate bureaus. The basic purpose of detention rules is not to raise revenue but rather to discourage under delay of motor carrier equipment by shippers and their representatives. Obviously, even if the Commission does not adopt a uniform nationwide detention rule, the numerous problems and issues involving detention would not disappear. Indeed, bureau and individual detention rules would remain in effect in order to serve the purposes for which they were conceived. Thus, the question is not whether to have detention rules, but rather, whether to have a uniform *nationwide* rule. Yet, with the actual merits of detention rules per se not in issue, many parties nevertheless proceeded to elaborate on the advantages and disadvantages of detention rules without addressing the specific issue at hand. Admittedly, while detention rules generally may tend to shift the carrier's labor problems and inefficiencies to the shipper, induce employee arguments, require recordkeeping, fail to account for factors other than weight in allocating free time, ignore numerous intraregional differences, fail to account for all the different types of commodities as well as how they are shipped and the types of equipment used—these arguments have no bearing on the issue of a *uniform* nationwide rule.

When the arguments in opposition to a uniform rule are stripped of irrelevencies, carrier flexibility is the one argument most commonly cited by opponents of a uniform nationwide rule. Several respondents refer to the carrier's need to be able to respond to dissimilar nationwide economic and geographic conditions. Others contend that such a rule will ignore differences in the character of local traffic needs and operating conditions. Consequently, it is asserted that a rigid rule such as the one proposed would impede the motor common carrier's ability to compete with alternative forms of transportation and to circumscribe its managerial discretion so as to curtail the industry's ability to react with the various rule adjustments that circumstances may require.

However, a comparison of the detention rules published by most major rate bureaus[6] offers insight into the flexibility argument urged by the rule's opponents. Thus, the detention and spotting rules published by six of the major rate bureaus are remarkably alike and even contain numerous identically worded sections. The differences that do exist are primarily exceptions to the general detention rule. For example, the SMC detention rule in items 500-5 through 500-55 contains 18 separate items specifically referring to 43 carriers. These items govern detention exceptions for vehicles, employees, and equipment individually or combined on local or joint-line traffic in connection with other named carriers; many are also applicable on LTL or AQ shipments. The wharves and piers of seven named ports are excepted from the rule, and the applicable free time on shipments transported on flat-bed equipment via Mason and Dixon Lines, Inc., is limited to 180 minutes regardless of weight. The SMC rule for vehicles without power units for unloading contains virtually the same exceptions and, in addition, is not applicable on containerized freight received from or delivered to water carriers, for which a separate rule is provided. The rule for vehicles without power units for loading applies to only four

[6]The comparison consists of the following six detention rules, all effective as of April 1, 1975: Southern Motor Carriers Rate Conference, Agent, Tariff 517-H, MF-ICC 1738, Items 500-B, 501-A; Eastern Central Motor Carriers Association, Inc., Agent, Tariff ICC ECA 149-J, Items 500-B, 501; Central and Southern Motor Freight Tariff Association, Inc., Agent, Tariff ICC CSA 127-A, Items 500-B, 501-G; Central States Motor Freight Bureau, Inc., Agent, Tariff ICC CMB 100-B, Items 500-C, 501-B; Middlewest Motor Freight Bureau, Agent, Tariff ICC MWB 125-A, Items 500-D, 501-D; Rocky Mountain Motor Tariff Bureau, Inc., Agent, Tariff ICC RMB 100; Items 500, 501. The detention rules of neither the Pacific Inland Tariff Bureau, Inc., nor the Niagara Frontier Tariff Bureau, Inc., are included because the former publishes numerous individual rate tariffs and the latter publishes several rules the application of which varies by territory. The rule of the Middle Atlantic Conference is not included because it is the rule prescribed by the Commission, and the rule of the New England Motor Rate Bureau is not included because it substantially differs from the others.

carriers while a separate rule providing for spotting of trailers at Clemson, S.C., applies only on trailers spotted for loading by Colonial Motor Freight Lines, Inc.

To differing degrees this pattern of specific exceptions is repeated in the detention rules of the other major rate bureaus. Thus, the general detention rule published by ECA is not applicable to Acme Carriers in connection with detention due to customs clearance or to Law Motor Freight, Inc., for which individual provisions are published in its own tariffs. A separate rule is published for the detention of vehicles with power units transporting iron and steel. Shipments transported on flat-bed equipment by McLean Trucking, Mason and Dixon Lines, Inc., and shipments on Spector Freight System, Inc., are limited to 180 minutes free time regardless of weight, and Spector Freight System, Inc., is also excepted from the provisions governing a change of flat-bed trailers with or without removable sides and drop-deck trailers to vehicles without power. The meal time exclusion from the computation of time when applicable is limited to one-half hour for Mason and Dixon Lines, Inc. Specific exceptions for which nine separate items are published exist for 30 carriers. Similarly, the ECA rule for vehicles without power units excepts Accelerated Transport and Hall's Motor Transit from the General Provisions section while Acme Carriers and Law Motor Freight are excluded as in the detention rule for vehicles with power. Spector Freight System, Inc., is excluded from the spotting rule, and specific exceptions for which eight separate items exist are published for 20 carriers. The provisions of the rule except 37 carriers to the extent that an additional item for the spotting of trailers for unloading is applicable. Four carriers are expressly made subject to another additional item for spotting service in connection with 10 tariff series of diverse nature.

The detention rule for vehicles with power published by Central States Motor Freight Bureau, Inc. (CMB), is not applicable on shipments of iron or steel articles and aluminum articles originating at McCook, Ill.; detention provisions are provided for these articles in a separate item. Free time is limited to 120 minutes per vehicle on shipments transported by Overland Western International, Inc., and Key Line Freight, Inc., when the latter is in the Detroit, Mich., commercial zone. For six carriers the transportation of freight other than loaded on pallets, platforms, racks, shipping NOI, or skids is subject to a reduced free-time series. For Liberty Trucking Company the maximum free time for weights over 20,000 pounds is

240 minutes, and for Hi-Way Dispatch the free time allowed on freight other than loaded on pallets, platforms, racks, shipping NOI, or skids is 180 minutes per vehicle regardless of weight. The CMB rule for vehicles without power excepts the free-time rules for Saturdays, Sundays, and holidays, from applying to Aikens, Bob, Lines, Inc., and C.L. & A. Motor Delivery, Inc., in connection with the detention at Lawrenceburg, Ind., of inbound vessels having had prior movement on ocean vessels, and provides that the charges section specifically apply to the two carriers in the above circumstances only. A lower and nongraduated-charge section is made applicable only on Griffith Motor Express, Inc., in connection with vehicles detained in Bloomington, Ind.

The detention rule for vehicles with power published by MWB is not applicable at Louisiana ports. The exclusion of meal time from the computation of time is not applicable with respect to 10 carriers. A separate schedule of reduced free times is inserted for shipments other than palletized freight on Fred Olson Motor Service Company, and shipments on Spector Freight System, Inc., are limited to 180 minutes free time regardless of weight and excepted from provisions governing a change of flat-bed trailers with or without removable sides and drop-deck trailers to vehicles without power. The MWB rule for vehicles without power units contains the above exception for Spector Freight System, Inc.

The detention rule for vehicles with power published by Rocky Mountain Motor Tariff Bureau, Inc. (RMB), provides excess free time for weights in excess of 36,000 pounds at Denver, Englewood, and Littleton, Colo., for eight carriers. It provides that the CMB detention rule apply exclusively to four named carriers and to two other named carriers when shipments are moving under rates in certain specified tariffs. Similarly, the provisions of the MAC detention rule are made applicable on shipments of Long Island Motor Haulage Corp. and Smith and Solomon Trucking Company. These eight carriers whose provisions are published in other agency tariffs are restricted to the extent that all charges assessed under the applicable tariffs must be collected from the shipper or consignee by the carrier assessing such charges. A separate detention rule with separate charges is set forth for Duff Truck Line, Inc., and separate provisions and charges are also published for Westway Motor Freight, Inc., in conjunction with Atchison, Topeka and Santa Fe Railway Company when shipments are moving under one item of a particular tariff. Additionally, a separate detention charge with

provisions is published for a group of five other carriers excluded from the general bureau rule. The RMB rule for vehicles without power units provides excess free time for Jenny Freight Lines, Inc., at Douglas, Ariz. It contains the same exclusions for Duff Truck Line, Inc., the carriers whose charges are assessed in whole or in part under the CMB or MAC tariff, Westway Motor Freight, Inc., and the separate group of five carriers.

The detention rule for vehicles with power published by Central and Southern Motor Freight Tariff Association, Inc. (CSA), is not applicable on shipments picked up at or delivered to eight named wharves or piers. The detention provisions and charges for shipments of iron and steel articles including cast iron pipe and related articles are published in a separate item except for such shipments by Superior Trucking Company, Inc., on local (single-line) traffic, Associated Transport, Inc., in one tariff, and Home Transportation Company, Inc., or when subject to rates in five specific tariffs relating to cast iron pipe and related articles published by Bowman Transportation, Inc. Separate detention provisions and charges are published for Associated Transport, Inc., Superior Trucking Company, Inc., on local (single-line) traffic, and Home Transportation Company, Inc., truckload and volume shipments on Kealy Trucking Co. are limited to 2 hours free time. For Mason and Dixon Lines, Inc., the free time on shipments transported on flat-bed equipment is limited to 180 minutes regardless of weight, and when applicable, meal time not to exceed 30 minutes is excluded from the computation of time. On Spector Freight System, Inc., the free time on shipments transported on flat-bed equipment with or without removable sides is limited to 180 minutes regardless of weight while the carrier seemingly by mistake is made subject to the provisions governing the change to a vehicle without power. The CSA rule for vehicles without power units similarly is not applicable on shipments picked up at or delivered to eight named wharves and piers, or to Home Transportation Company, Inc., Spector Freight System, Inc., on flat-bed trailers with or without removable sides, and Superior Trucking Company, Inc., on local (single-line) traffic. Detention of vehicles without power units is specifically made to apply on truck detention at destination for the purpose of holding a public sale of the contents thereof. A separate item provides alternative provisions and a reduced detention charge for spotting trailers via Johnson Motor Line, Inc., at Atlanta, Ga.

As a group the major rate bureaus acknowledge the similarity among their respective detention rules, and support progress toward uniform detention rules on a regional basis. At no point, however, do they present a thorough explanation or justification for the numerous highly specific exceptions in their detention rules. Instead, they substitute vague statements concerning the necessity of responding to and accommodating the dynamic conditions that individual carriers or the industry face within any particular area, bearing in mind that the shipping needs in one tariff region differ considerably from those prevailing in others. No mention is made of the criteria or procedures employed to determine which exceptions are necessary. There is no indication why particular carriers have different free times at specific points or why the flat-bed trailers of certain carriers may merit different treatment. Flexibility in the face of diversity fails as an adequate basis to dispose of allegations that these exceptions, whether designed by the carrier or the shipper, may be only convenient subterfuges for creating preferences, concessions, and rebates. Nor is there adequate explanation why some bureaus are relatively free of exceptions while others are not. Certainly, we cannot but conclude that the existence of these exceptions without the need for justification facilitates unlawful practices in violation of the act.

ECA and MWB in their joint statement observe that "numerous individual carriers maintain specific exceptions [to the bureau detention rule], or in some instances, maintain wholly separate rules." A superficial explanation would attribute such departures to individual carrier needs to meet competitive situations involving specialized motor carriers, freight forwarders, REA, rail TOFC, private carriage, and the various transportation services available to shippers in both intrastate and interstate commerce. Thus, according to these respondents, allegations of unjust and unreasonable practices, concessions, and rebates resulting from present detention rules or their lack of uniformity are not justified. However, in our opinion this interpretation is simplistic and contrary to other evidence received in this rulemaking proceeding; the explanation is, therefore, rejected. While some exceptions do exist to the prescribed Middle Atlantic detention rule, they nevertheless show that so diverse a territory can exist without requiring the numerous specific exceptions prevalent in the other rate bureau detention rules.

Detention rules, under the guise of flexibility, can provide a fertile source for preferences and other unlawful practices. Without

a uniform rule carriers will continuously be tempted or pressured either to interpret provisions of the rules or develop preferential exceptions to the rules in ways most conducive to the maintenance of good relations with influential shippers, to the expense of small shippers and the general public.

The Commission does not regard a uniform rule as a panacea to eliminate all forms of evasion or abuse, preference, discrimination, prejudice, concessions, and rebates within the industry. But it does believe a uniform nationwide rule will have a salutary effect with respect to current practices. A uniform nationwide rule authoritatively and finally clarifying detention and balancing the interest of shippers, carriers, and the public, will, in our opinion, have a very beneficial effect. In comparison to bureau rules, a prescribed uniform nationwide detention rule is better adapted to attracting the attention and commanding the observance of shippers and carriers alike.

The enforcement problem should be reduced in scale with the institution of nationwide rules. Manipulation of exceptions by carriers under the guise of flexibility will be eliminated. Since a single rule is naturally easier to monitor and enforce, the attention previously scattered or directed at specific exceptions can be channeled with emphasis on nonpreferential prearranged scheduling and spotting. To facilitate such monitoring, more comprehensive recordkeeping will be required, to be discussed in greater detail below. The reduction in the ambiguous and seemingly unnecessary multiplicity of rules in numerous localities should similarly help to ease the enforcement burden.

Prescription of a uniform rule can avoid harsher aspects of current detention rules, such as the storage and redelivery provisions and ease the rapid daily rise in detention charges. More reasonable and enforceable guidelines for meal periods and work breaks can help curb employee abuses. The issue of liability for detention charges can be clarified by an unambiguous uniform statement in the rule. In addition, the uniform nationwide rule can define spotting and thereby come to grips with current abuses of this service.

Perhaps the most important advantage of a uniform nationwide truckload and volume detention rule is economic. Simplification and standardization will facilitate greater efficiency through increased utilization of automated systems, will abate present confusion and misunderstanding, and in turn, forestall needless

expenditure of time, effort, and money. Administrative and auditing difficulties found with today's divergent, exception-ridden rules will be eased, facilitating shipper efforts to plan and integrate transportation costs. The nationwide rule generally will be more effective in bringing about the more prompt release of carrier equipment in a manner more equitable to all parties. In view of the above, we find adequate justification for establishment of a uniform nationwide truckload and volume detention.

LTL and AQ rates.—Although the same basic concepts underlie truckload and LTL detention, the parties note significant differences inherent in the nature of LTL detention that persuade us to handle it differently. Current LTL rates already are proportionately higher than truckload rates to reflect proportionately greater handling, pickup, and delivery costs, and time, including detention time. We also note the frequency with which the parties refer to the futility of establishing manageable prearranged scheduling for LTL movements. The parties are largely opposed to the proposed LTL detention rule. Their representations show that such a rule is considerably more complex than originally anticipated. Therefore, in recognition of the recent institution of Ex Parte No. MC-98, New Procedures in Motor Carrier Restructuring Proceedings, investigating the alleged small shipments problem and the LTL rate structure, we will postpone consideration of the desirability and content of a uniform LTL detention rule. This postponement will also allow us to proceed at a later date, if warranted, with the benefit of a thorough evaluation of the uniform truckload and volume detention rule adopted in this report.

Issue Two[1]—The lawfulness of carriers and shippers or receivers entering into voluntary prearranged schedules for the pickup and delivery of interstate shipments without tariff provisions authorizing such arrangements having first been published in tariffs lawfully on file with the Commission.

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[1]Formerly issue (4) of the Notice, it was shifted to enable the Commission to first address itself to the preliminary issue of lawfulness.

CONTENTIONS OF THE PARTIES

The general consensus of parties who responded to this issue is that prearranged scheduling without prior tariff authorization is lawful. While most responses are simple affirmations, a few are more comprehensive.

Several parties contend that voluntary prearranged scheduling is simply a matter of mutually beneficial cooperation and coordination, and, as such, may be performed without discrimination. Accordingly, prearranged scheduling carried out verbally and informally on a daily basis, dictated by routine traffic flow, advance knowledge, or other means currently existing without tariff authorization, is not unlawful, but rather included within the normal services of the carrier. Moreover, several parties attest to the fact that it has become a virtual necessity in everyday operations and is widely practiced. Parties also note that recourse under the act already exists if there is more involved than simple coordination.

General Mills, Inc., and other parties arguing the lawfulness of such scheduling without prior tariff authorization distinguish between section 2(a) of the Contract Terms and Conditions of the Uniform Straight Bill of Lading, which provides that a carrier's only obligation with regard to times or schedules is to transport property with "reasonable dispatch," and the concept of "expedited or special service."

Consequently, voluntary prearranged scheduling is lawful without prior tariff authorization if part of the carrier's "normal service," performed only with "reasonable dispatch," and equally available to all shippers regardless of size. For example, a request for a particular pickup date and time by a consignor or a particular delivery date and time by a consignee merely combines notice of certain circumstances with a request for transportation. Rather than constituting an unreasonable request, it affords the carrier an opportunity to decline if for some reason it cannot transport the shipment within its reasonable dispatch capability. In contrast, a special contract between a carrier and transportation user which envisions some special or expedited service not otherwise available to the shipping public would violate sections 216(b) and 217(d) of the Interstate Commerce Act and section 1 of the Elkins Act unless such a service was published in a tariff.

A few parties advocate tariff publication simply to remove lingering doubts as to legality and for the sake of convenience. Wilson Trucking Corporation and the Commission's Bureau of Enforcement (Bureau) are the only parties to conclude that voluntary prearranged scheduling without tariff authorization is unlawful per se.

The Bureau first contends that "voluntary" prearranged scheduling by small- and medium-sized carriers is, in reality, seldom

voluntary. Because of their size these carriers are particularly vulnerable to the demands of their major customers and to possible economic reprisal. As a result some carriers may be forced to go to great lengths, without additional charge, to accommodate major customers and their specific production-line schedules. According to the Bureau, these arrangements partake of unlawful concessions distributed in a highly discriminatory fashion. It refers to *Detention of Motor Vehicle—Middle Atl. & New England, supra* at 360-361, where the Commission, while not resolving the legality of such prearranged scheduling, concluded that prearranged scheduling without appropriate tariff authorization is an open invitation to discrimination.

Other parties similarly conclude that while prescheduling is a part of the normal service held out by carriers and beneficial to both the transportation user and the carrier, there is opportunity for discrimination, intentional or unintentional, in the absence of tariff publication and ancillary rules. A second contention of the Bureau is also predicated upon the language of section 2(a) of the Uniform Straight Bill of Lading Act. It states that in the absence of a special contract or undertaking a carrier is required merely to use reasonable dispatch and exertion in its transportation services.[7] By relating prearranged pickup and delivery scheduling to expedited service (which has been found to be beyond the carrier's duty of reasonable dispatch and thus require special tariff provisions and rates[8]), the Bureau concludes that prearranged scheduling similarly requires tariff authorization to be lawful. The Bureau also cites *dicta* in *Midwest Emery Freight System, Inc., Extension* (1962), docket No. MC-114019 (Sub-No. 78), 15 Federal Carrier Cases 35,564, where the Commission observed that "even a shipper's practice of instructing delivery dates by means of bill of lading insertions 'might also be unlawful if unsanctioned by effective tariff provisions to prevent unjust discrimination'." While recognizing a scarcity of precedent, the Bureau concludes that the present practice of establishing prearranged schedules without prior tariff authorization is not in accordance with the law and should be terminated.

Conclusion

It has repeatedly been asserted that prearranged scheduling is currently practiced on a large scale and considered essential in view

[7] *N. Y. & Norfolk R.R. v. Peninsula Exchange*, 240 U.S. 34 (1916); *Southern Pacific Company v. H. Rothstein & Sons*, 304 S.W. 2d 383 (Tex. Civ. App. 1957).

[8] *Fallgren v. Railway Exp. Agency*, 100 A. 2d 835 (N.H. 1953) citing *Chicago & Alton R.R. Co. v. Kirby*, 225 U.S. 155 (1912), and *Davis v. Cornwell*, 264 U.S. 560 (1924).

of the resulting benefits in economy and efficiency derived by shipper and carrier alike. The great majority of responding parties maintain that such scheduling on a voluntary basis without prior tariff authorization is lawful.

Having carefully considered the various representations we are of the opinion that prearranged scheduling agreements and arrangements for appointment pickups and deliveries are not inherently discriminatory, preferential, or prejudicial when performed without tariff provisions authorizing such service. The Bureau's contrary opinion is based on cases of questionable support inevitably resulting from the scarcity of precedent in this area. Prearranged scheduling, as pointed out by Pacific Motor Trucking Company and others, frequently is as much for the convenience of the carrier as the shipper. When for the convenience of the carrier or the mutual convenience of both carrier and shipper, we see no bar to the practice without tariff authority provided, of course, there is no discrimination as to the recipient of the service or the location of its performance.

Section 2(a) of the Contract Terms and Conditions of the Uniform Straight Bill of Lading provides that:

> No carrier is bound to transport said property by any particular schedule, train, vehicle or vessel, or in time for any particular market or otherwise than with reasonable dispatch.

We are not unmindful that a carrier may not provide expedited or special service without prior tariff publication, a requirement necessary to ensure all shippers uniformly available and applicable service.[9] However, prearranged scheduling is neither a form of, nor is it historicially related to concepts of expedited or special service. It is a natural outgrowth of the transportation service providing both shipper and carrier the mechanism to coordinate their schedules for their own mutual convenience. So long as scheduling is not unreasonably demanded by shippers to the detriment of the carrier, and so long as the arrangement does not constitute a special contract or undertaking to provide special service, storage, or expedited service beyond the usual course of transportation available to the public, then the bounds of reasonable dispatch are not exceeded.

[9] *Chicago & Alton R.R. Co. v. Kirby*, 225 U.S. 155 (1912); *Louisville & N.R. Co. v. Warren County S.G. Ass'n*, 267 S.W. 551 (Ky. 1924); *Schreppel v. Campbell Sixty-Six Express, Inc.*, 441 P. 2d 881 (Kan. 1968). Expedited service to be upheld must be previously published in tariff form, *Freight, All Kinds—Expedited Service—Chicago-Atlanta*, 314 I.C.C. 663 (1961).

Thus, when viewed simply as mutually beneficial cooperation and coordination between carrier and shipper, ordinarily available to the shipping public on an equal basis at origin and destination, voluntary prearranged scheduling without prior tariff authorization is a natural part of the line-haul transportation service, included within the line-haul rate, and not unlawful.

Issue Three—The need for requiring the publication of provisions therein requiring prearranged schedules to be established for the pickup and delivery of such shipments as a part of uniform vehicle detention rules.

Issue Four[1]—If prearranged schedules are necessary, whether such provisions are necessary with respect to (a) volume shipments, (b) truckload shipments, (c) LTL shipments, and (d) AQ shipments or any one or more of these four categories of shipments.

[1] Formerly issues (2) and (3) of the Notice, they have been combined to facilitate handling.

CONTENTIONS OF THE PARTIES

The Great Atlantic & Pacific Tea Company, Inc. (A&P), and other participants view prearranged scheduling as essential to the maintenance of a uniform detention rule. Several note the close interrelationship between the concepts of prearranged scheduling and detention. They observe that detention charges are intended to penalize consignors and consignees for detaining vehicles beyond reasonable free time while prearranged scheduling is intended to enable them to reduce or avoid such vehicle detention. The National Association of Food Chains (NAFC) describes them as perhaps the only way to preserve a semblance of order in a potentially chaotic situation.

Most parties generally concur that coordination is mutually beneficial, and a large percentage of them urge implementation of the proposed rule's mandatory tariff publication provision. Proponents of mandatory prearranged scheduling contend that it will provide the coordination required for definite scheduling and controlled operations. Prearranged scheduling allegedly will facilitate preplanning in all operational phases, and thereby prove itself essential to efficient, economic, and orderly operations. Such efficiencies will particularly be realized with respect to shipping and receiving docks, manpower, carrier and shipper equipment, warehousing and preplanned terminal work, and the heightened ability to maintain production-line schedules.

Having operated under the mandatory prearranged scheduling provisions of the Middle Atlantic rule for over 8 years, D&TPTC et al. conclude that they have proven invaluable to shippers and carriers alike for more timely pickups and deliveries in the most expeditious manner. Having published prearranged scheduling provisions for over 8 years, MAC states that it has no basic or inherent objection to the principle provided the provisions are carefully considered and developed so as to promote carrier efficiency and cost control.

The Department of Defense supports the general language in the rule, contending that it is broad enough to accommodate the multitude of varying situations and will suffice to ensure that the service is available to the public without danger of discrimination or managerial whim of particular carriers. Several other parties similarly support the publication of mandatory prearranged scheduling provisions, contending that they are necessary to prevent discrimination. Reservations are expressed by parties concerned that the rule would require the publication of specific schedules, while others emphasize that the rule should not be written to enable shippers to wreak havoc on efficient carrier operating schedules.

Parties opposed to mandatory prearranged scheduling argue that carrier flexibility and operating efficiency, so essential to both the carrier and shipper, would be destroyed in a prearranged scheduling "straitjacket." The need for flexibility is particularly stressed because it enables the carrier effectively to adapt and speedily to react to the multitude of operating practices and contingencies that continually develop.

Several parties contend that there are just too many operational difficulties inherent in mandatory prearranged scheduling. SMC asserts that the variables and contingencies associated with a several-hundred-mile trip are simply too numerous for accurate prediction of arrival times. It suggests that shippers may abuse the scheduling provision with lengthy delaying tactics designed to make the most out of their own inadequate warehouse space. Additionally, SMC and other parties allege that carriers in general and the smaller carriers in particular will be forced to tie up large portions of their fleet while losing many usable hours waiting for the scheduled times. Thus, an ostensibly reasonable request for a late-morning schedule could tie up a vehicle, thereby preventing its normal morning and afternoon run. Several respondents expressed concern that the rule will force carriers into adopting shipper schedules without the compromise and coordination incidental to

voluntary prearranged scheduling. Moreover, it is argued that the additional recordkeeping required to handle the arrangements will increase while the cost of additional recordkeeping personnel will cause the carriers' position to deteriorate. Other parties allege that operational problems will arise. Cited is the example of truckloads delivered straight from line haul without first going through the local terminals when the rule only requires carriers to respond to prearranged scheduled deliveries made through local terminals. Just the uncertainty as to when drivers will report their availability is said to hinder the dispatcher's ability to set up workable prearranged schedules. Reynolds Metals Company poses the problem of a breakdown in prearranged schedules occurring when the shipper has nothing to ship or the carrier is short of equipment for the pickup or delivery schedule. Concern is also expressed for the storage and redelivery rules, particularly when the consignee's plant is closed for vacation.

Other opponents contend that, in addition to being too rigid and unworkable, mandatory prearranged scheduling will, by its very nature, discriminate in favor of the large carrier. NEB among others contends that the relatively small number of complaints does not justify imposing prearranged scheduling. Several parties express concern that the rule will be upsetting the contractual liabilities developed under the bill of lading contract. Thus, SMC suggests that in addition to placing an intolerable and unnecessary burden on the motor carrier industry it will subject the carrier to costly civil litigation upon inability to comply with prearranged schedules.

Since the above arguments regarding the need for publication of prearranged schedules as part of a uniform detention are sufficiently applicable to the question of whether prearranged scheduling is necessary with respect to truckload and volume shipments, the remainder of this discussion will concentrate on the parallel question of whether such a need similarly exists for LTL and AQ shipments.

Among the parties addressing themselves to this issue, the great majority strongly oppose the imposition of prearranged scheduling for LTL and AQ shipments. While there is limited support for such provisions, for the most part it is contingent upon the Commission actually deciding to prescribe a uniform nationwide LTL and AQ detention rule.

Opponents of prearranged scheduling for LTL rates note numerous operational problems which allegedly impede and even

preclude its functioning. These stem from the different nature of LTL service and are, to a large extent, beyond the control of the parties. Thus, parties contend that as difficult as it may be to develop and maintain truckload schedules, to do the same for LTL is simply impossible. Furthermore, its impracticality and disruptiveness would create more problems than would be solved. NEB maintains that in addition to its other problems, a need for such a provision has not been shown. PITB and others contend that problems with traffic, accidents, prior detention, weather conditions, equipment, and the daily variations in the number and weight of shipments will prevent a carrier from preserving prearranged schedules. Particularly cited is the example of the "peddle" truck whose routes change daily to accommodate the numerous pickups and deliveries made by the single vehicle in the course of a day.

It is also contended that the time required to load or unload LTL and AQ shipments is a function of factors more within the carrier's control than is the case with truckload shipments. NAFC refers to the carrier's method of loading and unloading, its propensity to separate and confuse shipments, and additional carrier handling (such as the transfer of lading from one vehicle to another) as factors tending to increase instances of missing pieces and time-consuming checks at delivery. For example, wrongly sized pallets necessitating a transfer will cause significant losses in time. The consensus of the parties indicates widespread opposition to prearranged scheduling for LTL and AQ shipments on the basis of its impracticality—a view similarly held by the Bureau of Enforcement for shipments of less than 10,000 pounds.

The minimum weight at which carriers would be required to accept offers for reasonable prearranged schedules is the source of significant controversy. While alternative minimum weights of 5,000 and 8,000 pounds are suggested, others contend that any weight less than 10,000 pounds would cause the system to bog down. The National American Wholesale Grocer's Association suggests giving shippers and carriers the option to make prearranged schedules regardless of size. Both NAFC and the Four Bureaus observe that between the 12,000-pound minimum weight of the proposed uniform truckload detention rule and the 10,000-pound minimum weight for prearranged scheduling of LTL shipments, there is not enough of a differential to make prescription of an LTL rule worthwhile.

CONCLUSION

The parties overwhelmingly indicate that prearranged scheduling has proven beneficial to both shippers and carriers. Parties employing these arrangements derive significant economic advantages as a result of the more orderly and efficient utilization of shipping and receiving docks, carrier, equipment, and manpower. Beyond this, however, the parties' consensus ends. A review of the statements addressed to this issue shows that parties are divided, with more favoring the publication of uniform nationwide provisions establishing and regulating prearranged scheduling for truckload and volume shipments.

Support for the provision exists among all who aver actual experience with prearranged scheduling under tariff authorization. D&TPTC et al. observe that the proposed rule's provisions are the same as those in effect in MAC territory for over 8 years and "are both reasonable and practical *** and have proven invaluable to shippers and carriers alike for more timely pickups and deliveries *** in the most expeditious, efficient manner." Acme Markets, Inc., whose activities are centralized in MAC territory, similarly observes that over the years, the MAC detention rule has proven substantially successful and workable. It considers the perpetuation of the scheduling provision absolutely essential from the economic standpoint of both carrier and shipper. And MAC points out that obvious potential for discrimination and abuse exists without a tariff provision authorizing prearranged scheduling. Having published the Commission's prearranged scheduling provision since 1965, MAC concurs in the need for nationwide publication of uniform tariff provisions authorizing prearranged scheduling for truckload shipments for pickups and deliveries consisting of 10,000 pounds or more. In contrast to the observations of parties who have had firsthand experience with prearranged scheduling under the MAC detention rule, are the contentions of those opposed to the publication of provisions establishing uniform nationwide prearranged scheduling. While mostly in favor of voluntary prearranged scheduling, as currently practiced, they contend that if mandated by tariff provision, prearranged scheduling will destroy both carrier flexibility and operating efficiency while inhibiting carrier ability to respond to the changing circumstances they commonly face.

Since the record establishes to our satisfaction the desirability of prearranged scheduling in terms of both efficiency and economy,

and since it is pervasively employed at the present time, we are at a loss to understand the objections raised to including such a provision in the proposed detention rule for vehicles with and without power. The provisions are extremely general, and leave the functional details to the carriers. They do not require publication of specific schedules, nor will they prohibit alterations or interruptions when necessary. We do not believe such provisions, prefaced with reasonableness and as further clarified in the Analysis of the Adopted Rule, *infra*, will throw the motor carrier industry into a straitjacket of inflexibility as predicted. Indeed, our experience with the MAC detention rule indicates otherwise.

Such objections are particularly mystifying in view of the position of other parties. Thus, PITB states it has "no basic objection to those provisions since they do no more than require carriers to enter 'into a reasonable prearranged schedule.' " With regard to the scheduling provisions of the proposed appendix B, PITB additionally observes that "dealings between carriers and shippers or receivers with respect to spotted trailers inherently require this type of arrangement." We do not envision a significant diminution in carrier flexibility as a consequence—although a limited period of reassessment and modification may be inevitable as well as timely. If prearranged scheduling makes carriers recognize legitimate service needs of shippers while impressing upon shippers the limitations necessary for the maintenance of successful motor carrier operations, then it should redound in a more efficient motor common carrier system. Publication of uniform nationwide provisions authorizing prearranged scheduling could be mutually beneficial to the shipping public and the motor common carrier industry. Rather than imposing inflexibility upon the industry, we regard these provisions as providing shippers and carriers the means with which to obtain the certainty necessary for more planned and efficient operations consistent with the national transportation policy.

Elementary fairness also calls for tariff publication authorizing prearranged scheduling. If detention charges are imposed upon users of motor transportation, such users are entitled to this means to reduce their potential detention charges. Shippers, of course, are not required to use prearranged scheduling if such is their preference, but on the other hand it should be available to those who desire it. While the concepts of prearranged scheduling and detention are not necessarily interdependent, they are interrelated,

and when combined into one rule may be used to maximum effectiveness without unduly impairing the flexibility of the carrier.

In addition to the anticipated improvements in economy and efficiency, several parties assert that a uniform truckload detention rule with prearranged scheduling will serve Grain Processing Corporation observes that "The opportunity, intentional or unintentional, for discrimination among small and large shippers, is too omnipresent in the premises [sic] to permit such scheduling devoid of tariff publication and ancillary rules and provisions." Additionally, Certain-Teed Products Corporation cites *Detention of Motor Vehicles—Middle Atl. & New England, supra* at 361, where the Commission in adopting the recommended report said, "carriers should not determine at their own convenience whether prearranged schedules should be established. This would invite discrimination." Coca-Cola, in addressing the need for publication of prearranged scheduling provisions, states that "all parties should pay their own way and such provisions appear to be necessary in order to prevent abuse by a few to the detriment of the many."

Other parties similarly support mandatory prearranged scheduling. A&P contends that prearranged scheduling is of "primary importance" and that "the conditions under which it is to be performed should be published in lawfully filed tariffs in order to prevent discrimination." Purex Corporation states that "In view of the widespread practice of prearranged scheduling we feel that provision must be made for such circumstances in any rule governing vehicle detention." PITB observes that "As a practical matter, tariff provisions are desirable to avoid potential discrimination." Asphalt Roofing Manufacturers Association favors publication of scheduling rules in all motor carrier tariffs noting that "Such publication will minimize the potential for discrimination or prejudice against individual shippers." And MAC also observes that "Without tariff provision authorizing such scheduling there is obvious potential for discrimination and abuse."

The observations of the Bureau support these assertions. The Bureau notes that of the 239 complaints or inquiries relating to vehicle detention practices of motor common carriers received in fiscal 1971-72, 190 or 80 percent, concerned scheduling. The most frequent themes are carrier failure to provide prearranged scheduling for pickups and deliveries and carrier failures with regard to shipper requirements or demands for scheduling of pickups and deliveries.

The availability of prearranged schedules geared exactly to production line specifications appears directly correlated with shipper size, particularly in the area of spotting. Allegedly for the mutual convenience of both shipper and carrier, a number of large shippers use their substantial leverage over carriers to establish holding yard arrangements for the pickup and delivery of trailers. Under these arrangements, a trailer is dropped at a holding yard designated by the shipper, but spotting is not presumed to commence until some time later when the trailer is actually moved from the holding yard to the shipper's dock. The cost of moving these trailers is also borne by the carrier. The desirability of this type of operation is readily apparent from the perspective of the large shipper. These holding yards can expand the shipper's warehousing facilities, eliminate the shipper's labor cost ordinarily resulting from moving the trailers, and provide the shipper with the flexibility of having trailers ready for loading and unloading at any moment of the day or night. Such around-the-clock scheduling is not available to any but the largest shippers. However convenient it may be to distinguish between dropping and spotting with respect to holding yards, the fact remains that this activity is not consistent with traditional spotting practices. While large shippers admittedly have special needs, it is also true that because of their leverage they also can receive valuable services not available to the general shipping public.

In retrospect it appears that present practices with regard to prearranged scheduling fail to provide the shipping public with (1) notice of both the availability of prearranged schedules and the criteria for their establishment either on a single shipment or on a continuing basis, and (2) the procedures for obtaining such schedules. This leaves the according of prearranged schedules totally within the discretion of the carrier. Although voluntary prearranged scheduling is not unlawful per se, we nevertheless believe that truckload and volume prearranged scheduling without prior tariff authorization can be conducive to discriminatory and preferential conduct in violation of sections 216(d) and 217(b) of the Interstate Commerce Act.

In cases such as *Definition of Loading & Unloading*, 343 I.C.C. 457 (1973), *Middle Atlantic Conference* v. *Transport Corp.*, 321 I.C.C. 308 (1963), and *Segregation of Freight, New Eng. & Mid. Atl. States*, 340 I.C.C. 306 (1971), the Commission sought to reduce possibilities for favoritism and to insure that the shipping public receives equivalent service under appropriate charges. For example,

in *Middle Atlantic Conference* v. *A.A.A. Trucking Corp.*, 321 I.C.C. 406 (1963), we found that furnishing more than one person to perform loading and unloading services for shippers, without tariff authorization or charge therefore, is a practice fraught with potential discrimination since the decision as to whether to increase the value of the carrier's service is left totally within the carrier's discretion.

In view of the above considerations, we find that a uniform truckload detention rule with prearranged scheduling will significantly benefit the motor common carrier industry in terms of economy and efficiency while aiding in the elimination of present abuses therein. Having postponed consideration of the proposed LTL detention rule and having found prearranged scheduling without prior tariff authorization lawful, we shall postpone consideration of the need for prearranged scheduling provisions with respect to LTL and AQ shipments.

Issue Five—The level of vehicle detention charges to be assessed and collected for such service.

CONTENTIONS OF THE PARTIES

Many parties interpret this last question as a referendum on the issue of uniform nationwide detention charges and respond accordingly. In support of a uniform nationwide charge D&TPTC et al. discount the alleged existence of numerous regional differences asserting that they are not pertinent to detention. They contend that detention charges in reality bear no relation to the rate structure; rather, the only two meaningful cost factors are driver wage scales and average depreciation cost of carrier equipment. Therefore, considering the basic uniformity in cost factors along with recognition of nationwide similarities in driver wages and depreciation averages, D&TPTC et al. support a uniform, cost-justified, exact charge without any penalty element. The National Industrial Traffic League (NITL) uses similar reasoning in concluding that a uniform nationwide charge is possible. It suggests a cost-justified charge with a limited penalty element resulting from rounding the charge to the next whole dollar.

Grain Processing Corporation urges uniform charges at a level similar to any other type of detention, while both Certain-Teed Products Corporation and General Mills, Inc., support prescription of charges at a level sufficient to deter and remunerate without

making detention profitable in itself. A single nationwide level of charges is considered highly desirable by Ford Motor Company in view of the variations among tariffs governing detention charges on vehicles containing shipments originating or terminating at a particular industry.

Contending that the variety of hourly detention rates to shippers are unfair, prejudicial, unjust, and discriminatory, Rebo Transit, Inc., supports a uniform nationwide charge. It also notes the possibility of carriers charging noncompensatory detention rates to attract certain traffic, and of shippers routing traffic via carriers selected for their lower detention charge. Rebo advances $50 per hour as a suitable charge intending it to provide a penalty rather than a mere hand slap. Michigan and Nebraska Transit Co., Inc., suggests a maximum daily detention charge of $150 with an hourly charge of about $20. These charges would be applicable to vehicles with or without power units since small carriers with a virtually matched power and trailer fleet, or irregular-route carriers who lack trailer pools stationed throughout their operating territory, would otherwise be placed at a competitive disadvantage vis-a-vis the larger carrier which has extra trailers and engages in the practice of spotting.

The Department of Defense, recognizing detention's dual elements of compensation and penalty, suggests that the Commission prescribe a detention charge based upon an average reasonable level as determined by cost evidence of record. The General Services Administration contends that equitable, lawful, and reasonable nationwide detention charges will encourage and assure more responsive, nondiscriminatory, nonpreferential, nonprejudicial pickup and delivery services incident to interstate traffic and transport and consequently assure a more equitable and reasonable level of detention charges with respect to all classes, types, and sizes of interstate shippers.

Of the 239 complaint or inquiry situations in fiscal 1971-72, the Bureau of Enforcement reports that 10 percent involved carrier failure to provide a common detention charge on all traffic delivered at the same destination regardless of origin, territory, or commodity and the failure of carriers correctly to assess and collect applicable detention charges.

The more numerous opponents of uniform nationwide detention charges rely on the many variables that a single charge would allegedly ignore. The Salt Institute cites the dissimilar economic conditions that exist throughout the country in contending that such

a charge would be unreasonable. According to NEB, the diversity within the country is too great for a single charge; detention charges should reflect the costs incidental to the service for which the charge is levied. SMC contends that charges may properly vary by territory leaving carriers free to adjust the level of charges according to existing circumstances, equipment availability, and the practice of shippers in a given area. The Four Bureaus contend that the relative costs of carrier employees including Teamsters, the costs of equipment and maintenance even for identical equipment, the cost of different types of equipment including refrigerated, dry van and flat bed, and such factors as average service requirements, congestion at shipping facilities, and the mix of equipment utilized vary from region to region. The major rate bureau structures reflect these regional differences in the carrier cost of doing business in the regions, but a single detention charge which may be an effective deterrent in some areas may be totally inadequate in others, thereby compromising the basic purpose of detention. PITB states that charges should be cost related and effective as a deterrent while varying from area to area and time to time to take into account operating conditions. Wilson Trucking Corporation observes that charges cannot be uniform since they should reflect carrier costs where service is performed, a view similarly held by Ruan Transport Corporation.

Several parties aver that under the Interstate Commerce Act it has traditionally been the carrier's prerogative to initiate and set rates. Such exercises in managerial discretion are integral to the operating efficiency of the carriers. Others add that the act itself in conferring upon the Commission power to investigate and suspend offers sufficient control with respect to this exercise of discretion. Furthermore, the zone of reasonableness concept delineates the lawful area of charges and stands for the principle that there is not a single lawful charge. MAC opposes a prescribed nationwide charge alleging that in its experience, prescribed charges do not keep pace with increases in carrier operating costs; consequently, with the passage of time their effectiveness as an incentive to shippers to upgrade their facilities and handling diminishes.

The parties generally agree that detention charges should at least compensate carriers for their expenses. More controversy arises concerning the penalty aspect of the charge. While the majority of the parties concur in the need for a penalty element, several participants express concern that detention not become profitable in itself, thereby vitiating the entire purpose for detention rules.

D&TPTC et al. conclude that a cost-based charge is an extra cost and penalty enough. The NITL, in noting that neither the Commission's prescribed MAC charge nor any other bureau detention charges has ever been cost justified, urges an end to experimentation and the establishment of a reasonable basis on which to peg these charges. It asserts that the basic ingredients are all readily available to define a cost-justified detention charge.

CONCLUSION

The representations disclose uncertainty among both respondents and shippers regarding the nature and operation of the Nation's detention system. Thus, the major motor carrier rate bureaus, in their joint petition to broaden the proceeding, filed October 19, 1973, state that "While detention charges contain an element of compensation, they are primarily in the nature of penalty charges rather than service charges." In apparent support of this statement ECA and MWB contend that calculating the level of charges by the cost of labor, depreciation, overhead, and profit is "unduly simplified" and will not succeed in maximizing efficiency. Instead, they argue that the level of detention charges should be largely governed by local circumstances at the point where detention occurs, with the impact of various relevant factors determined on a case-by-case analysis. Indeed, they conclude that the Commission could not cope with or even consider "the almost infinite variety of circumstances which occur at literally thousands of origins and destinations which comprise the total territory which must be served by the national transportation system of motor common carriers." Having rejected costs, however, it is uncertain just how the bureaus plan to arrive at their charge. This Commission questions how the bureaus can take into consideration in their single charge these numerous unmentioned factors and circumstances in any relevant way, particularly considering the tremendous territory in which both the ECA and MWB charges are in effect.

The Four Bureaus perceive a conflict concerning the proper basis for detention charges in terms of whether charges should reflect "costs to the carriers only" or "regional differences." They agree with the latter, contending that pure cost-based detention charges would offer shippers an incentive to incur detention rather than improve their facilities. Nevertheless, while recognizing deterrence as the primary purpose of detention, and recompensation as

secondary, they contend that rate bureau charges must and do "reflect the relative differences in the carrier costs of doing business" in the various regions, and consequently, bear a relationship to the present effective underlying rate structure. Therefore, notwithstanding their rejection of carrier costs, it would seem that these bureaus use them in a determination of their respective detention charges and therein lies the regional difference.

PITB advocates uniform regional detention rules and charges, regardless of the shipment's origin or destination. It contends that the level of detention charges should be related to costs while being "high enough to be an effective deterrent to unreasonable delays" and capable of change from area to area and time to time to reflect operating conditions. Perhaps this position comes closest to the statement made by the bureaus in the petition to broaden the proceeding. SMC contends that "detention charges should be maintained at relative levels to prevailing rate structures" with carriers "free to adjust the level of charges according to the circumstances existing, the equipment availability, and the practices of shippers in a given area."

On the basis of these statements it appears that a good deal of uncertainty exists among carriers concerning the methods used to determine detention charges. Carrier costs are deemphasized apparently because detention is not intended simply to produce revenue. Costs alone may not be sufficient to deter detention, and costs may not be truly indicative of carrier losses resulting from fewer truckload shipments. However, if the bureaus are not employing costs as a standard for detention charges, then they are replacing it with something rather vague and unclear yet allegedly calculated to reflect carrier costs in each locale in a way that will provide just the right incentive for shippers to improve their facilities.

Shipper parties are considerably less vague regarding the method of computing detention charges. They basically advocate cost-justified charges but are more divided on the issue of whether they should be on a regional or nationwide basis. While acknowledging the need for effective detention charges, some contend that the charges should simply remunerate carriers for costs resulting from detention, others acquiesce in the need for a minimal penalty element if deemed necessary to make the detention charges effective, and others recognize a dual nature in detention and view it principally as penalizing transportation users to ensure the prompt release of equipment.

With regard to the nature of detention charges, we have long recognized that demurrage charges are intended to penalize shippers who detain freight cars beyond the allotted free time. For example, in *Demurrage Rules and Charges, Nationwide*, 340 I.C.C. 83, 88-89 (1971), we defined the main question to be "whether the penalty previously provided for is adequate, or a sufficient deterrent against the undue detention of freight cars ***." Basically relying on evidence showing a steady increase in freight car detention, we found that the prior demurrage charges, established in 1964, had lost their penalizing effect in relation to the state of the economy in 1970. We cited our former decision in *Increased Demurrage Charges, 1956*, 300 I.C.C. 577, 585 (1957), wherein we said:

> The primary purpose of demurrage regulations is to promote equipment efficiency by penalizing the undue detention of cars. *Pennsylvania R. Co. v. Kittanning Co.*, 253 U.S. 319, 323. It has long been recognized that demurrage charges are not to be regarded as a source of revenue ***.

In *Increased Demurrage Charges, 1956, supra*, we acknowledged that except in extraordinary circumstances, car detention unlike motor vehicle detention is solely within the control of the shipper. We have nevertheless acted consistently in applying the same basic criteria to both forms of detention.[10] Contrary to statements alleging that a penalty element is inappropriate and counterproductive, we continue to believe that the purpose of motor vehicle detention, as of demurrage, remains to secure greater efficiency in the use of carrier equipment through the imposition of a penalty charge upon shippers who detain equipment beyond the free time allotted them at origins, stopoff points and destinations.

Several considerations determine what constitutes a lawful level of detention charges. Although historically regarded as a penalty, it stands to reason that detention charges must cover carrier costs. Otherwise, the carrier is the party being penalized.[11] Without being excessive, the charge must in fact penalize shippers who detain carrier equipment if it is to realize its principal purpose of deterrence.[12] Thus, to be effective, a charge must initially

[10] *Detention of Motor Vehicles—Middle Atl. & New England*, 325 I.C.C. 336, 340 (1965); *Segregation of Freight, New Eng. & Mid. Atl. States*, 335 I.C.C. 239, 246 (1969); *Detention of Motor Vehicles—Middle Atl. & New England*, 344 I.C.C. 333, 338 (1973).

[11] In *Detention of Motor Vehicles—Middle Atl. & New England*, 344 I.C.C. 333, 339 (1973) in finding an increase in the prescribed detention charge just and reasonable based upon a showing of increased costs we said, "While motor carrier costs are not 'the most important' or the sole factor in determining whether charges for accessorial services are reasonable as alleged by the conference they are to be considered by us."

[12] *Increased Demurrage Charge, 1956, supra*, at 586.

recompensate while taking into account the ability of the transportation user to adjust and respond in the anticipated manner. As part of a delicate balance, the charge cannot be a profitable alternative to the carrier's regular transportation service. Just as a detention charge may fail because its penalty effect is insufficient to induce shippers to upgrade their facilities, so too will it fail if the carrier or its employees find detention profitable and thereby prolong it intentionally or otherwise. It must also be remembered in selecting an appropriate charges that the carrier does have greater control over detention than over demurrage.

Participants who object to the addition of a penalty element or propose that detention charges be based exclusively upon proven carrier costs overlook the penal nature of detention and thus the purpose of this rulemaking proceeding. Detention charges are punitive, not revenue generating, and certainly not profit oriented. Indeed, they succeed in their purpose when the need for them has been eliminated.[13] Costs are a necessary starting point in all carrier charges, but in the instant proceeding, cost factors are secondary to the initial problem of improving equipment utilization, improving carrier service, and effecting more equitable competitive conditions by means of uniform detention rules. Once carrier costs are covered and a penalty element added to insure that the detention charge is an effective deterrent, then any extra compensation received by the carrier above actual costs, is an unavoidable byproduct of the conflicting duality of detention rules. Nevertheless, it is questionable whether detention charges—even with a penalty element—can substitute for the actual profit earned from an additional carrier pickup or delivery.

To clarify further the nature of motor vehicle detention, we will now focus on the actual operation of the Nation's regional detention system, and the contrast with a uniform nationwide detention charge. Major motor carrier rate bureaus publish the majority of rates and charges for both large and small regular-route general-commodity motor carriers. Each bureau publishes a detention rule and charges for that territory in which its rates and charges govern. Thus, the primary function of the Niagara Frontier Tariff Bureau (NFB) is the publication of rates between this country and Canada. Similarly, NEB publishes rates for movements exclusively within the New England territory, MAC for movements within Middle Atlantic

[13] In *Demurrage Rules and Charge, Nationwide, supra* at 92 we said, "although we hope that increased demurrage charges will result in less and not more revenue being derived—if shippers release cars more promptly than would otherwise have been the case this hoped for result will be achieved ***."

territory (and in a hybrid capacity, between Middle Atlantic and New England territory), CMB for movements exclusively within Central States territory, and MWB for movements within Middlewest territory (and in a hybrid capacity, between Middlewest and Central States territory). ECA has no geographical territory but acts as a bridge, publishing rates for movements between Middlewest and Central States territory on the one hand and Middle Atlantic and New England territory on the other. SMC publishes rates for movements within Southern territory and in a hybrid capacity between Southern territory on the one hand and Middlewest, Middle Atlantic, and New England territory on the other. CSA, like ECA, has no defined geographical territory; it also acts as a "bridge" publishing rates for movements between Central States and Southern territory. PITB publishes rates for movements within the Pacific Northwestern States including Oregon and Washington and RMB publishes rates for movements within Rocky Mountain territory,[14] and in a hybrid capacity publishes rates between PITB territory and Rocky Mountain territories, and transcontinental rates between Rocky Mountain and PITB territory on the one hand and all other territories on the other. With the exception of the five carriers who in whole or in part specifically flag out to CMB and two carriers who specifically flag out to MAC,[15] the RMB detention rules and charges are applicable nationwide and in effect are a nationwide charge.

The interaction of these rate bureaus may be demonstrated by arbitrarily choosing a point within Central States territory. If a shipment from this point is destined to or originating from Middle Atlantic or New England territory, the applicable detention charge would be published by ECA; if destined to or originating from Middlewest territory, the charge would be published by MWB; if destined to or originating from Rocky Mountain or PITB territory the charge would be published by RMB; if destined to or originating from Southern territory the charge would be published by CSA; and if destined to or originating from Central States territory, then the applicable detention charge would be published by CMB. Thus, for this point in Central States territory, five interstate detention charges are applicable depending on the shipment's origin or destination. Similarly, five interstate detention rules are applicable

[14]Generally the area west of the Rocky Mountains except within PITB territory and within California on interstate movements.

[15]Rocky Mountain Motor Tariff Bureau, Inc., Agent, Tariff ICC RMB 100, effective September 25, 1974. See page 24, *supra*.

for shipments originating from or destined to points in New England territory, four with respect to Middle Atlantic territory, three with respect to Southern territory, and two with respect to PITB territory. Even excluding intrastate detention charges, this welter of different detention rules and charges can only result in confusion and misunderstanding among the shipping public. For example, one participant in this proceeding understimated the number of detention charges applicable to the Chicago area alone; it erroneously referred to the anomalous existence of four currently effective interstate detention charges.

From this analysis of the current rate bureau detention structure, it is apparent that a multiregional detention system now exists wherein the RMB detention charge is applicable throughout the country, the SMC charge in three quarters of the country, and both the ECA and MWB charges in one half of the country. Because of the large expanses in which these charges are applicable, it does not appear that the bureau charges can in fact consider "local circumstance at the point where detention occurs" as alleged by ECA and MWB. Similarly, since they span one or more regions, we do not believe that they truly reflect regional differences—and certainly not from the shipper standpoint. NEB, in support of the present system of regional charges, states that "a national uniform level of detention charges which would have to apply throughout the country may very well be counter productive. A fair level in the midwest might be totally inadequate in New England while being excessive in the southwest." In fact NEB maintains the highest detention charge of any bureau, but this charge is applicable only on movements within New England. Movements to or from New England territory with respect to any other region are governed by one of the other rate bureau detention rules whose charges are 60, 75, 85, and 90 percent of the New England charge.[16] By NEB's own definition, the present system yields inadequate detention charges vis-a-vis interregional movements to and from New England.

The Four Bureaus in their joint statement similarly state that:

> The detention charge that will be effective in one region may not be effective at all in another region. Carrier customers do not have the same average cost factors from region to region. The detention charges that are an effective deterrent within the South may be inadequate for the purpose in Central Territory or the reverse could be true. Thus, the same spread of penalty over carrier costs will not effect the same degree of deterrence.

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[16]See appendix III, table I.

The average conditions on Eastern-Central Motor Carriers Association traffic within Central States Motor Freight Bureau region may not be considered sufficiently similar to the average conditions on Central States Motor Freight Bureau traffic within that region to permit the same detention charges on equipment and men detained within.

However, in 1973[11] the applicable detention charge on movements between the Southern and Central territory was the CSA charge which was actually lower than either the SMC or the CMB charge. Shippers incurring detention in Southern territory paid less when the origin was Central territory than if the movement was entirely within Southern territory. Simiarly, the 1975 SMC charge, which does in fact govern detention in NEB territory on movements between the two territories, is 25 percent less than what NEB considers to be an adequate and effective deterrant with respect to its own territory. Interestingly enough, with regard to the last part of the above quoted statement, the ECA charge is currently effective in Central territory on movements between CMB territory on the one hand and MAC and NEB territory on the other, and this is so regardless of whether any similarity exists to average conditions in CMB territory. Thus, allegations regarding each region's uniqueness and contentions that charges adequate in one region will not be adequate in another diminish in import because the applicable detention charge is not determined by the region in which detention occurs but rather by the origin or destination of each individual shipment. From this analysis it may be stated that charges developed under the present rate bureau detention structure cannot take into consideration shipper cost factors in the manner as has been alleged. The major contention of those opposed to a uniform nationwide detention charge—that such a charge would fail to take into consideration differing regional circumstances and as a consequence be excessive in some areas and inadequate in others—is in fact an accurate characterization of the current detention structure. A uniform nationwide charge would at least offer such advantages as simplicity, uniformity, and predictability without the pretenses made for "regional" charges. Admittedly such a uniform rule would be limited in basing charges on local circumstances, but this is no less the case with regional bureau charges that cover huge and diverse territories of their own as well as being effective in other regions.

Having concluded that regional detention charges as published by the major motor carrier rate bureaus frequently fail to relate to

[11] *Id.*

factors and circumstances within their applicable regions, it remains to be determined whether such regional detention charges are in fact cost related or cost-justified and preferable to a uniform nationwide detention charge. This analysis, like the former, is of the present detention structure but from the perspective of carrier costs. The continuation of this regional cost-related system was advocated by several of the major motor carrier rate bureaus and other parties.

In this analysis, it is convenient to begin with those bureaus whose charges are effective in their region alone; being least complicated they would appear to be in the best position to obtain true regional detention costs levels. Assuming, *arguendo*, that the regional cost level is a weighted average of the system costs of carriers operating exclusively within the territory plus those carriers operating interterritorially with respect to the territory, the regional cost level would necessarily be distorted. The interterritorial carriers cannot be expected to break down their system detention costs by region. Thus, through the introduction of cost data from interterritorial carriers, the regional detention cost level is distorted and reflects multiregional detention cost levels rather than those of the single region.

With the "bridge" rate bureaus, that only publish rates and charges for interterritorial movements, member carriers will similarly submit system costs that are not broken down by region. Thus, their combined system cost, under the current regional structure, includes data from every region in which they operate and consequently cannot resemble regional costs. Moreover, the hybrid bureaus, which are a combination of the above two examples, cannot reflect regional detention cost levels any more accurately than their components. RMB's detention charge is effective nationwide for transcontinental movements; therefore, it cannot reflect the costs for RMB territory alone because its cost data feedback reflects nationwide costs. If it sought to reflect just RMB costs, then it could not pretend to reflect costs for transcontinental movements since one charge simply cannot reflect both, and in this instance it actually reflects neither.

The regional rate bureau structure actually bars detention charges from reflecting both carrier costs of doing business within the region and regional cost differences as manifested in each region's particular factors and circumstances. The actual regional structure distorts consideration of regional cost differences while the numerous motor carriers operating multiregionally distort

purported regional costs. What we have is a system of regional charges allegedly related to regional costs that do not in fact portray these costs. Again, a uniform nationwide detention charge would be preferable to this system.

Apparently in response to the confusion and misunderstandings resulting from multiple detention rules and charges within single geographic areas, several of the major rate bureaus and others suggest the possible restructuring of the present regional detention system. Under the proposal, detention charges would continue to vary by region; however, only one detention rule and charge would be applicable for detention occurring within the region regardless of the origin or destination of the shipment. While this proposal results in a simplification and might permit the detention charge to be more closely related to regional factors and circumstances, it would still suffer the same cost-related failure resulting from carriers operating multiregionally. On interterritorial movements, it could fail to recompensate the carrier whose detention costs actually exceed the uniform regional charges as established by the bureau in whose region detention occurred.

Certain anomalies appear in the present system of cost-related regional detention charges and may be illustrated in table 1 of appendix III. This table includes a comparison between hourly pickup and delivery costs and charges among eight of the major rate bureau regions as well as a nationwide weighted average. Pickup and delivery hourly expenses (column 2) and hours in pickup and delivery service (column 5) were developed through application of Highway Form A[18] to the expenses and statistics of class I and II motor common carriers of general commodities. The pickup and delivery hourly expenses include wages of drivers and helpers, employee welfare expenses, social security taxes, depreciation of revenue, equipment, public liability and property damage insurance, and vehicle licenses and registration fees.

Hourly expenses in column 2 were adjusted to reflect wage and material price levels for the year 1973, through use of cost update ratios provided in Statement No. 73, *Cost of Transporting Freight by Class I and Class II Motor Common Carriers of General Commodities—1973*. Columns 6 and 7 are variable and fully allocated pickup and delivery costs stated on a regional basis to correspond more closely to the conditions affecting rate bureaus in which detention charges are levied, rather than to those affecting

[18] Highway Form A, 3-73, entitled "Formula for the Determination of the Costs of Motor Carriers of Property."

the basic cost regions. The 1973[19] and 1975[20] regional detention charges included in columns 8 and 9, lines 1 through 8 were weighted by the regional hours in pickup and delivery service (column 5) to produce a weighted average charge of $13.55 for 1973 (line 9, column 8) and $15.11 for 1975 (line 9, column 9).

A simple comparison of rate bureau costs and charges illustrates their apparent failure to correlate. The NEB cost is one of the lowest; yet its charge has consistently been the highest. CMB has the third highest cost, but had the sixth lowest charge in 1973 and the seventh lowest charge in 1975. The MAC cost is fourth highest while its prescribed charge has consistently been the lowest. SMC has the lowest cost and the fifth highest charge in both time periods, while MWB has next to the lowest cost and the fourth highest charge. An additional anomaly, previously referred to,[21] is that the charge published by CSA in 1973 was lower than both the SMC and CMB charges although CSA only publishes rates and charges to govern movements between the two regions. At this point, it is also interesting to note the striking similarity between detention charges for vehicles without power and storage charges. Table 2 of appendix III compares these two charges and in so doing reveals that of the eight rate bureaus studied, four publish identical charges and two more publish charges that are pennies apart. Considering the different nature of these charges, their similarity implies that there is an absence of detention cost-related considerations. In *Detention of Motor Vehicles—Middle Atl. & New England, supra*, we adopted with some qualifications the examiner's statement of facts and printed pertinent excerpts from the examiner's report. In these

[19] The August 13, 1973 regional detention charges were taken from the following tariffs: Central States Motor Freight Bureau, Inc., Agent, Tariff 500 BB, MF-ICC 1599, Item 300; Eastern Central Motor Carriers Association Inc., Agent, Tariff ICC ECA 149-H, Item 340; New England Motor Rate Bureau, Inc., Agent, Tariff 2-P, MF-ICC A-315, Item 1830-2; Middle Atlantic Conference, Agent, Tariff 10-W, MF-ICC A-2410, Item 50; Southern Motor Carriers Rate Conference, Agent, Tariff 517-G, MF-ICC 1689, Item 500; Central and Southern Motor Freight Tariff Association, Inc., Agent, Tariff ICC CSA 127, Item 678; Middlewest Motor Freight Bureau, Agent, Tariff 225-D, MF-ICC 680, Item 2060; Rocky Mountain Motor Tariff Bureau, Inc., Agent, Tariff ICC RMB 100, Item 500.

[20] The April 1, 1975 regional detention charges were taken from the following tariffs: Central States Motor Freight Bureau, Inc., Agent, Tariff ICC CMB 100-B, Item 500; Eastern Central Motor Carriers Association, Inc., Agent, Tariff ICC ECA 149-J, Item 500; New England Motor Rate Bureau, Inc., Agent, Tariff ICC NEB 102-P, Item 1830-2; Middle Atlantic Conference, Agent, Tariff 10-X MF-ICC A 2510, Item 50; Southern Motor Carriers Rate Conference, Agent, Tariff 517-H, MF-ICC 1738, Item 500; Central and Southern Motor Freight Tariff Association, Inc., Agent, Tariff ICC CSA 127-A, Item 500; Middlewest Motor Freight Bureau, Agent, Tariff ICC MWB 125-A, Item 500; Rocky Mountain Tariff Motor Bureau, Inc., Agent, Tariff ICC RMB 100, Item 500.

[21] See text accompanying note 15 *supra*.

excerpts the examiner discussed the level of detention charges to be prescribed and found that the "costs of record for a driver and tractor-trailer unit range from $7.18 an hour to $14 an hour." He concluded that the proposed charge of $10 an hour was reasonable if the increments are 15-minute periods. The 1973 fully allocated pickup and delivery hourly costs for eight of the major rate publishing bureaus are listed in column (7) of table 1 of appendix III. With a range of $7.70 for SMC to $9.76 for RMB the cost diversity among the regions is less dramatic than within the Middle Atlantic region at the time we prescribed its charge. This phenomenon is not particularly startling. Recognizing that extreme diversities exist within the very large areas composing the motor common carrier rate bureau regions, we find nothing extraordinary in the premise that with respect to detention, intraregional carrier costs can very as greatly as average interregional costs.

In Ex Parte No. 297, *Rate Bureau Investigation*, 349 I.C.C. 811, 839-840 (1975), we questioned whether the various motor rate bureaus should join in seeking general rate increases on a nationwide basis instead of on a individual bureau basis. The record revealed an almost across-the-board preference for regional costs. Based in part upon these representations, we concluded that however meritorious the goal of unformity may be, it does not in this instance take precedence over each region's individual revenue needs, cost characteristics, and other differences which should be preserved. However, detention cannot be likened to a general increase. Having found a uniform nationwide detention rule advantageous with respect to its simplicity and uniformity, adaptability to curb current detention abuses, and emphasis on improving efficiency, we believe that the addition of uniform nationwide charges provides the logical counterpart to the rule and is both necessary and desirable if the rule is to live up to its expectations. This belief is particularly buttressed by our conclusion that (1) the detention charge is primarily a penalty charge and (2) the present regional detention structure precludes a satisfactory assessment of either regional carrier detention costs or general cost levels within the regions.

The detention charges adopted herein, while above the 1975 weighted average as calculated in table 1 of appendix III, are well within the range of charges presently in effect. We believe these charges at this time are sufficiently penal without providing an incentive to prolong detention, but upon a showing that such

charges fail to cover regional costs, they will be appropriately revised.

V. Analysis of the Adopted Rule

It is now time to turn to the form and substance of the rule itself. As a result of the representations and subsequent close scrutiny, it appears that appendixes A and B of the proposed rule, as set forth in our Notice, were not sufficiently comprehensive or free of ambiguity in terms of current transportation needs. Consequently, the revised rule that has emerged and is adopted by this report is far better adapted to dealing with detention in today's context. Numerous structural changes have been made to the extented format for purposes of coherence and clarity. The representations of the parties and their implications were instrumental in developing the substantive changes and initiatives appearing in the rule. A conscientious effort was made to keep within the structure of current transportation and business practices so long as the results were not conducive to collusion. The following part-by-part analysis is intended to furnish insight into how the adopted rule should be interpreted while providing information concerning the sources of the rule's changes. For more specific sources of these changes, consult the comprehensive summation of the representations in appendix II, *infra*.

Detention-Vehicles With Power Units

Preamble.—The proposed rule is the source of the preamble. It was modified to be consistent with the organization of the two rules and to be more inclusive.

Section 1.—General provisions.—Several relatively important changes to the rate bureau rules and the proposed rule have been made herein. In particular the former section 1(3), requiring the carrier to obtain a guarantee of payment for detention charges upon execution of section 7 of the bill of lading, was deleted. The Commission's credit regulations are adequate to handle the area of charges without resorting to the potentially troublesome and easily evaded restrictions of this former section. It is also anticipated that the other major changes regarding time entries, responsibility for delay, and recordkeeping will sufficiently strengthen this area without having to rely upon a section of this nature.

1. *Section 1(a).—Weight limit.*—In accordance with the suggestions of several respondents the proposed rule was modified to broaden the term "truckload shipments" to include shipments moving at stated minimum weights of 10,000 pounds. This acknowledges that truckload rates presently exist at this lower bracket, and that rate bureau tariffs generally recognize 10,000 pounds as the minimum truckload. Reducing the minimum truckload weight also was prompted in part to compensate for our decision, *supra,* to postpone consideration of the LTL-AQ rule.

Although the proposed rule initially had been intended to include shipments traveling under a capacity load rule or involved in exclusive use of vehicle or expedited service, their specific inclusion conforms to standard rate bureau rules. The actual language used acknowledges that these rates are not offered by all carriers, and that their specific listing should not be construed as an exclusive or exhaustive compilation of when the detention rule may be applicable.

2. *Section 1(b).—Applicability.*—The proposed rule was modified to be applicable when delay or detention is not attributable to the carrier. This issue of responsibility for delay engendered significant controversy. The change in emphasis, to place the burden of proving delay effectively on the shipper, was made partially in response to the problem of shipper abuse of the rule as presently drafted in *Detention of Motor Vehicles—Middle Atl. & New England, supra.* Some shippers apparently presume that any delay in loading or unloading is attributable to the carrier. They point to any occurrence as justification for blaming delay on the carrier. If such problems were exclusively the fault of the carrier, there simply would be no need for a detention rule or charge.

Revising the language in the section relieves the shipper of detention charges to the extent that the carrier identifiably caused them to accrue. Otherwise, upon expiration of free time, the unscrupulous shipper could consistently defeat the rule. Under the former wording, detention would not accrue in such circumstances and, as a consequence, free time would become irrelevant—an unacceptable resolution. When free time expires with neither party patently at fault, the carrier's vehicle is nevertheless detained. In such circumstances the delay should be attributable to the number of packages, packing, or packaging.

The change in the responsibility for delay is accompanied by changes in section 3, "Computation of Time." These changes give the shipper the option to enter the time of arrival and completion as

well as the length of carrier's employee's "normal nonworking period" onto the carrier's detention record and thereby provide the shipper with a heretofore nonexistent measure of control. These elements serve to counterbalance each other and make the adopted rule more equitable, efficient, and practical.

Furthermore, this resolution is preferable to a rule which generally refuses to acknowledge that detention can be the fault of the carrier. As a compromise, the revision should reduce the previous amount of controversy. Of course it remains true that neither this nor any tariff can definitively place fault. To parties intent on protracting the issue of responsibility for detention in violation of the rule's spirit, the final resolution can only be made on the particular facts in each case.

3. *Section 1(d).—Assessing charges.*—While precedent in the area of liability was clearly enunciated in *Middle Atlantic Conference* v. *United States,* 353 F. Supp. 1109 (D.C. 1972), the present modification of the proposed rule should eliminate any remaining uncertainty. The section was redrafted to reflect the recommendations of numerous critical and concerned parties. When charges must be assessed against the shipment because the person causing detention is not a party to the bill of lading, the party responsible for the payment of the freight charges will be held responsible for any accrued detention charges. At all other times, the party causing the detention is responsible regardless of whether the shipment is sent prepaid or collect.

Since the Commission's rule is not applicable to persons not party to the bill of lading contract, it can recompensate the carrier but generally fail to penalize the real source of detention abuse at port facilities. Note A reduces the charges owed under the Commission's detention rule to the extent the Federal Maritime Commission (FMC) promulgates and enforces payment of detention charges on third persons responsible for detention and subject to its jurisdiction. Nevertheless, the carrier remains entitled to recover charges from the party responsible for the payment of the freight charge to the extent the FMC charge yields less than the Commission's charge.

4. *Section 1(e).—Driver and power unit..*—While omitted in the proposed rule, this section is derived from the standard rate bureau rule. It simply indicates that the reduced detention charge for spotted trailers is predicated upon the absence of both the carrier's employee and power unit.

5. *Section 1(f).—Normal business hours.*—The proposed rule and the rate bureau rules are the source of this section. The term "normal business hours" is to be interpreted in its ordinary literal sense unless appropriately defined in carrier tariffs. It is therefore left undefined herein. The second sentence in the section was added in response to a request for clarification. It assures that the rule will not be interpreted to prevent carriers from accepting off-hour pickups or deliveries if circumstances make such pickups or deliveries expedient and performance is not on a preferential, discriminatory, or prejudicial basis.

Section 2.—Definitions.—Since the Bureau of Enforcement and other parties request a section defining the operative terms of this rule, and such a section appears in rate bureau detention rules, we have concurred in the need for a definition section. An examination was made of all the specific requests for definitions but only a few were selected. A rule of such broad scope and national impact cannot define all terms without becoming overly generalized or unduly cumbersome. For example, terms such as "normal business hours" and "responsible representative" do not require definition simply because they may already be defined in existing tariffs or may be construed in their normal form of usage consistently with the spirit of the rule. Subjective terms such as "reasonable" and "attributable to" are also better left undefined.

6. *Section 2(a)—"Vehicle".*—The source of this definition was in Note A of the proposed appendix A. The definition is intentionally left broad to encompass all equipment, and renders the original exception redundant.

7. *Sections 2(b) and (c)—"Loading" and "Unloading".*—These definitions are taken almost verbatim from standard, current rate bureau rules. The proposed appendix A never contemplated fully defining these terms. However, in retrospect we believe the definitions add clarity and will thus eliminate a source of contention.

8. *Section 2(d)—"Premises".*—This definition was specifically developed to aid the computation of time. It is phrased to denote all surrounding attached and unattached property within reasonable proximity to the principal loading or unloading facility of consignor, consignee, or other designated parties.

9. *Section 2(e)—"Site".*—This is a standard definition inserted to distinguish between "site" and "premises" with respect to section 4(f) and particularly with respect to the rule for Detention-Vehicles Without Power Units.

10. *Section 2(f)—"Normal nonworking periods".*—This definition was developed to designate the quantity of time allocated to carrier's employee. It shall not detract from the free time allocated the shipper, and any "normal nonworking" time taken in excess of that allocated will simply increase the shipper's free time—since this delay by definition is attributable to carrier.

11. *Section 2(g)—"Pallet".*—This definition was taken from current rate bureau rules. Numerous comments were made concerning the proposed rule's failure to take account of palletized and partially palletized shipments.

Section 3.—Computation of time.—This section is derived from the section 2 "Computation of time" of the proposed appendix A. It presents the regulations in a more orderly and comprehensive manner.

12. *Sections 3(a)(1) and (2).—Commencement and termination.*—In response to suggestions, the proposed rule was clarified to require the actual notification of a responsible representative of the shipper before the running of free time commences. Following other suggestions the remainder of the section is taken from appendix C, section 2(a) of the proposed rule and adapted to the purposes of this section. It contemplates the maintenance of a detention record for all truckload shipments and gives the shipper the option to enter the arrival and completion time onto the carrier's detention record. The section is phrased in permissive rather than mandatory terms because this Commission lacks jurisdiction to compel shippers to enter times onto the detention record. Nevertheless, it is anticipated that most shippers will avail themselves of the opportunity to develop a fair record from which detention charges if accrued may be determined.

These are the first of three such entries designed in part to counterbalance the shift in the responsibility for delay contained in section 1(b) while fitting within the provision of the recordkeeping section. The shipper, by being given the right to participate in the development of the detention record, may monitor to an extent the work of carrier's employees. In return, the carrier is placed in a position allowing for greater driver accountability. While we reject allegations that detention is exclusively attributable to any one party or group of employees, we anticipate that the control element established herein will increase efficiency and moderate a significant area of friction and abuse.

The preparation time exlusion of the proposed section 2 was eliminated. Although, in *Detention of Motor Vehicles-Middle Atl.*

& New England, supra at 366, it was said that a carrier is obligated to furnish a vehicle ready for loading or unloading, and that as a consequence preparation time is not chargeable to detention, we find the accompanying illustration erroneous. While the vehicle must arrive clean and ready for loading or unloading, this is not intended to include acts that can reasonably be done only at the shipper's premises, such as covering the vehicle with a tarpaulin or in other ways securing the shipment. This kind of vehicle preparation is, in reality, an unavoidable and necessary part of the loading or unloading, and therefore an integral part of the transportation service. Thus the exclusion was an unnecessary complication in time computations. As a result of its elimination, time will simply be calculated to include the interval between arrival and completion less the time allocated for "normal nonworking periods."

13. *Section 3(b)(1).—Prearranged scheduling.*—The source of this section is the proposed rule. As revised, it anticipates carrier developed rules outlining the specific practices and procedures designed to regulate prearranged scheduling. Such coverage is expected to specify the procedures and notice required of shippers and carriers engaged in the making and breaking of prearranged schedules, whether they be on a continuous or one-time basis, and any other provisions necessary for the satisfactory implementation of this rule.

The phrase "without additional charge" emphasizes that prearranged scheduling is essential to an equitable, uniform nationwide truckload and volume detention rule and should be construed as part of the line-haul rate.

In the proposed rule "reasonable" was used to modify "prearranged schedule," whereas in the adopted rule "reasonable" modified "request." This change was made to expand the concept of reasonable prearranged scheduling. The phrase "reasonable request" should be read in the specific context of the individual carrier. Not only must the requested schedules be reasonable in themselves, they must also be realistic with respect to the capacity and operating efficiency of the carrier. Thus, a large carrier is expected to satisfy requests for prearranged schedules more easily than a small carrier. Prearranged scheduling is neither intended nor expected to operate in a vacuum oblivious of the ability or efficiency of the carrier. In lieu of destroying carrier flexibility, it is intended to create a pragmatic system, capable of maximizing mutually beneficial cooperation and coordination.

Although the carrier retains significant flexibility, this rule presupposes that the usual prohibitions against preference, prejudice, and discrimination will prevent abuse of the rule with respect to specific favored shippers.

14. *Section 3(b)(2).—Prearranged scheduling delay.*—It is unlikely that a totally satisfactory solution can be devised to resolve the problem of the arrival of vehicles at later than their prearranged time. However, upon reconsideration of our original holding in *Detention of Motor Vehicles-Middle Atl. & New England, supra* at 342, we conclude that the late arrival exception of the proposed appendix A is too conducive to the granting and receiving of unlawful preferences. The adopted section provides two alternatives. The first allows carrier and shipper mutually to agree to a prompt alternative time. "Prompt" is to be interpreted as requiring that the rescheduled arrival be within the briefest time span compatible with the needs of the carrier to obtain a quick release of its vehicle and the shipper to avoid excessive detention. An important consideration in emphasizing promptness is to end the alleged practice of using trailers as additional warehouse space. Repeated instances of rescheduling in excess of 24-hour intervals could be construed as one indication that preferences in the form of warehousing are being provided. The second alternative provides that the carrier may arrive late if the parties cannot agree to a "mutually convenient and prompt alternative arrival time." To compensate partially the shipper for the carrier's power to reject an alternative time and any adverse effects the late arrival may cause, additional free time up to 60 minutes is provided on an incremental basis. The impact of the late arrival will also be cushioned because section 3(c) of the adopted rule has altered the applicability of storage and redelivery charges.

15. *Section 3(b)(3).—Prearranged scheduling early arrival.*—The source is section 2(a) of the proposed rule. The language is adopted verbatim.

16. *Section 3(c)(1).—Conditions governing the computation of time.*—This section is derived from the proposed rule and is typical of most rate bureau rules. It is intended to demarcate the specific hours during which time may run. Section 1(f), *supra*, and this section are not contradictory; the former states that the carrier is not required to conform to the hours and schedules of the shipper. And together, they provide that carriers are not required to perform at other than their normal business hours. Shippers may not protract the running of free time by arbitrarily distinguishing pickup and

delivery hours from general business hours and restricting the length of the former or selecting hours generally incompatible with "normal business hours." Consequently this section is specifically worded to compute time at the "designated place of pickup or delivery," a more embracing phrase than "designated premises at place of pick up or delivery" in section 2(b) of the proposed appendix A. Time is to be computed simply by the shipper's normal business hours if it in fact abbreviates its shipping and receiving hours. If there is a conflict between hours, it is at the expense of the shipper who is unwilling or unable to make his schedule conform to the normal business day and hours of the carrier.

17. *Section 3(c)(2).—Conditions governing the computation of time—End of business hours.*—The proposed rule is modified through this section to provide more adequately for loading or unloading, which through fault of neither party, cannot be completed on the date of arrival. This section represents a significant departure from present bureau detention rules in that it relaxes the alternative dilemmas of storage and redelivery charges or prohibitively high labor charges when a holdover situation develops. The adopted rules present the shipper with two alternatives currently existing in most rate bureau rules: to convert to spotting or to request the return of the vehicle at the start of the next day's business hours. Redelivery and storage charges however, are not entirely eliminated; they may be charged when free time has expired. But with regard to the ordinary late morning or afternoon delivery, when the remaining business hours at shipper's loading and unloading platform are less than the hours allocated to free time for the shipment, it is unduly penal to add redelivery and storage charges onto the line-haul charge. A shipper under these circumstances is simply being penalized for accepting a shipment at this later time. Consequently this section should encourage a more even distribution of daily pickup and delivery schedules.

18. *Section 3(c)(3).—Conditions governing the computation of time—Nonworking periods.*—This section departs from current methods of handling the carrier employee's normal nonworking time. Whereas the proposed rule and many rate bureau rules provide that when loading or unloading is interrupted for a normal meal period, meal time not to exceed one hour will be excluded from computation of time. This wording, however, overlooks several points. It fails to relate the length of the meal period to any measurable standard, thus enabling it at times to be totally out of balance with the free time allocated the shipment. In addition, it

disregards the possibility that shippers may rotate their crews to avoid common meal periods or that shipper crews simply may have meal periods at times different from the carrier's employee. Lastly, it also overlooks the existence of any other breaks taken by carrier's employee.

Rather than regulating the length of a meal period or correlating it with the amount of free time allocated the shipment, this section aims at the broader issue of general nonworking time. This section and section 2(f) recognize the existence of the institutionalized coffee break and other rest breaks and their necessity considering the arduous nature of the work. Merging the coffee break and rest break into the former "normal meal period" for time-keeping purposes is intended to result in increased accountability and a reduction in abuse. The combined total of all driver breaks, as recorded by cooperating shippers under normal nonworking periods, is deductible from any detention that may accrue. And, for section 3(c)(2)(ii) purposes, normal nonworking periods are excluded from the time computation to determine whether free time has in fact run and redelivery and storage charges will be assessed. Thus, the section leaves the length and frequency of such breaks to the carrier, but at the same time assures the shipper it will not be penalized by the loss of free time. In effect, the section may actually result in a slight expansion in the amount of free time allocated.

If the shipper does avail itself of the opportunity to enter the "normal nonworking period," monitor its own employees, and coordinate times to the extent possible, then there can be increased efficiency to the mutual benefit of all parties. This section intentionally avoids recognition of shipper meal periods, however. Any such breaks, not concurrent with the carrier's "normal nonworking period," potentially add to the detention of the vehicle by the shipper and may not be excluded.

Section 4.—Free time.—This basic section exists both in the proposed rule and all detention rules. The revision clarifies several issues raised by the recommendations of various parties. Of particular importance is the new provision regulating palletized shipments.

19. *Section 4(a).—Duration.*—The major rate bureau rules provide the source for this section. It adopts the format and time-weight breakdowns currently in effect in most rate bureau detention rules. Upon analysis it seems unnecessary to continue special treatment for overflow shipments. The one-column format with a less than

10,000-pound bracket for overflow quantities below truckload weight insures that equal weights are accorded equal free time. Thus the simpler single-column format covers the same problems as the more complex two-column approach originally proposed.

Free time is in pounds and minutes "per vehicle stop" so that each stop for completion of loading or for partial unloading has free time equivalent to the weight being loaded or unloaded. This conforms to the prevalent practice among rate bureaus and recognizes shipper needs in this area.

20. *Section 4(b).—Palletization.*—This section was modeled in part after current ECA, MWB and CMB provisions governing palletization. Several parties had noted the proposed rule's failure to take into consideration the practice of palletizing shipments. The revised section recognizes this and in addition the different nature of flat-bed and other open-top equipment. Both palletization and open-top equipment individually or when combined substantially reduce the amount of time necessary for loading and unloading, and so they are accorded one-half the free time that would normally be applicable for a given weight. Since weight here remains an important factor in loading and unloading time, it is preferable to vary free time rather than to fix it as in the case of palletized shipments in the rate bureau rules.

21. *Section 4(c).—Multiple loads.*—This revision clarifies section 4(a) by providing that LTL and AQ shipments accompanying truckload shipments will be counted together for a higher total free time increment when loaded on and/or unloaded from the same vehicle at the same premises. In conformity with the rule's allocation of free time by weight-per-vehicle stop, it further provides one free time increment, based on total actual weight, for multiple truckload shipments loaded on and/or unloaded from the same vehicle at the same premises. Thus, a consignor shipping two truckload shipments in one vehicle to different consignees has a single free time based on section 4(c) and each consignee has an individual free time based on the weight of its truckload shipment and section 4(a). Thus, certain advantages accrue to both shipper and carrier, in addition to the operational benefits of combining into multiple shipments.

22. *Sections 4(d)-(f).—Other free time provisions.*—These sections are taken almost verbatim from rate bureau detention rules. By providing the mechanics for calculating free time under various contingencies they close certain gaps that had existed in the proposed rule.

23. *Section 5.—Charges.*—The proposed rule was modified to increase the charge increments from 15 to 30 minutes. This should minimize disputes and recordkeeping problems without undue emphasis on the penalty effect of the time increments. The level of the charge is reasonably related to charges now in effect within the various rate bureaus and takes into account both cost and penalty elements of detention.

24. *Section 6.—Records.*—At the heart of the adopted detention rule is an expanded recordkeeping section. The maintenance and retention of a comprehensive written detention record for each truckload shipment will facilitate ongoing Commission enforcement efforts, and reflects the request of many participants regarding the need for adequate enforcement. The eleven entries, three of which may be made by the shipper, are designed primarily to enable a complete and accurate recomputation of the detention charge for any truckload shipment and to circumvent abuse by either carriers or shippers. The entries designated for the responsible representative are part of the required detention record and must be preserved along with the written detention record if the carrier has not integrated them into one form.

DETENTION-VEHICLES WITHOUT POWER UNITS

Following several suggestions, the title of the proposed appendix B was changed to "Detention-Vehicles Without Power Units" for consistency and in acknowledgement that it is in fact a detention rule. Nevertheless, while this half of the rule exists to govern instances when spotted trailers are detained, it must also clarify on a uniform nationwide basis the rules and procedures governing the spotting of trailers. In this respect little difference actually exists between the adopted rule and current rate bureau detention rules. The subtitle and Note are aimed at ending the terminological dispute regarding spotting. Henceforth, the practice of spotting is recognized as the only alternative to the carrier's loading/unloading of the vehicle.

Various technical changes have been made so as to combine the best features of rate bureau detention rules and the proposed rule. Section 6 of the proposed appendix B was entirely delected in response to a broad consensus among the parties.

Preamble.—The revised preamble, by describing the rule's applicability rather than defining "spotting," parallels the rule for vehicles with power units. Thus, it geographically expands the

recognized spotting area to fill any void resulting from the elimination of dropping as a separate practice.

Section 1.—General provisions.—This section parallels the structure used for vehicles with power units and similar rate bureau rules and fills technical gaps noted by several parties.

25. *Section 1(a).—Availability.*—This section was derived from the preamble of the proposed appendix B. It authorizes the spotting of trailers among carriers offering the service, and requires carriers to make reasonable efforts to accommodate shippers desirous of spotting services. While carriers may not accede to shipper requests for spotting on a preferential, discriminatory, or prejudicial basis, they can deny such requests if their capabilities or schedules render it unfeasible at any particular time.

26. *Section 1(b).—Loading/Unloading.*—Part of this section was taken verbatim from the proposed rule and part from rate bureau detention rules. The section emphasizes the fundamental spotting concept that the consignor, consignee, or other party designated by them must perform the loading or unloading operation. No option can be given the parties in this respect, since it is on this factor along with the absence of the power unit, that the relatively lower spotting detention charges are predicated. When the bill of lading shows "Shipper Load and Count" the burden to show loss or theft falls on the shipper, thus protecting the carrier from unsupported allegations. See, *Modern Tool Corp.* v. *Pennsylvania R. Co.*, 100 F. Supp. 595 (N.J. 1951).

27. *Section 1(c) and (d).—Safeguarding.*—These sections are taken almost verbatim from the proposed rule; rate bureau detention rules contain no such provisions. Together, they specify when carrier and shipper responsibility for safeguarding truckload shipments commence and terminate. Thus, carrier responsibility terminates when a trailer is left at any site designated by shipper, whether it is on or removed from shipper's premises or is on a holding yard owned or rented by shipper or any person designated by it.

28. *Section 1(f).—Assessing charges.*—Although this section exists neither in the proposed rule nor in the rate bureau rules, it was included in response to requests to clarify liabilities in spotting. In phrasing and content, this new section parallels the section establishing liabilities for the detention of vehicles with power units, so that the same rules on liability apply for both. Since it is unlikely that persons other than those party to the bill of lading contract will spot trailers, this section's only departure from the former is its silence with respect to such a contingency.

29. *Section 1(g).—Pickup and delivery.*—This section is derived from rate bureau detention rules. Its phrasing parallels that of its counterpart in section 1(f) of the rule for vehicles with power. The section enables the carrier to operate within its normal business hours or outside them, if expedient, so long as such operations do not involve preference, discrimination, or prejudice.

Section 2.—Definitions.—The definitions are intended to clarify the practice of spotting in unmistakable terms in order to prevent abuse.

30. *Section 2(a)(1) and (2).—"Vehicle," "Trailer," and "Tractor".*—While appearing neither in rate bureau rules nor the proposed rule, these definitions were added for clarity because of their frequent appearance.

31. *Section 2(b) and (c).—"Loading" and "Unloading".*—These definitions are basically the same as those appearing in the rule for vehicles with power and are essential for proper time computations.

32. *Section 2(d) and (e).—"Premises" and "Site".*—The definitions for "premises" and "site" are the same as used in detention of vehicles with power. They are of greater importance in this rule since they are instrumental in clarifying the concept of spotting.

33. *Section 2(f).—"Spotting".*—This definition is partially derived from the preamble of the proposed rule, and clarifies the nature of the practice of spotting. Once a trailer to be spotted is brought to the first site designated by the shipper or party designated by the shipper, service on the line-haul rate is deemed to be terminated and the carrier is relieved of any further responsibility for safeguarding the trailer until notification has been given and the carrier has retaken possession of the trailer.

This definition rejects the concept of spotting advanced by Ford Motor Company. Under line-haul rates the shipper does not have a right to have trailers placed at their loading and unloading platforms when they were formerly placed by the carrier in a holding yard site, regardless of whether such is for the convenience of the carrier or the shipper. This practice is not traditional motor common carrier service, whereas the references to railroad practices and operations is inappropriate since the two are not analogous. If efficiency dictates the use of holding yards or other arrangements in connection with large shippers, then it should be their responsibility, not the carrier's to move trailers to and from their platforms. The shipper cannot have it both ways: if the carrier must leave the vehicle in a holding yard arrangement with either itself or its agent moving the trailers, then any accrued detention is subject

to the charges for vehicles with power units, and if trailers are spotted at a designated site with either the shipper or its agent moving and loading or unloading then any accrued detention is subject to charges for vehicles without power. The concept of spotting adopted herein requires placing the trailer, unaccompanied by power unit or carrier's employee, at the first place designated by shipper, and returning for it at the time requested by shipper when the trailer is ready for immediate movement beyond shipper's premises. Otherwise, if the carrier is required to move the trailer in between these two movements, it is not realizing the economies inherent in spotting and the shipper is not entitled to the reduced charges for detention. Prearranged scheduling and spotting are intended to aid the shipper in planning operations and increasing efficiency; they should not increase the options available to the large shipper as a consequence of its size.

Section 3.—Computation of free time.—This section is new, combining elements of the previous free-time and time computation sections. Several additions of substance were made. In particular, prearranged scheduling provisions were made applicable to spotting, and time computations were clarified.

34. *Section 3(a)(1).—Commencement of spotting and free time.*—Standard rate bureau detention rules are the source of the approach here taken in computing time. Whereas the proposed rule granted free time somewhat more liberally, the adopted rule limits it to 24 consecutive hours. The language employed in this section conforms to the enlarged concept and definition of spotting contained in section 2(f) of this rule.

35. *Section 3(a)(2).—Weekends and holidays.*—This section departs from the proposed rule by excluding Saturdays as well as Sundays and holidays from the computation of free time. This exclusion was requested by many parties and is generally found in rate bureau detention rules. As in the rate bureau rules this exclusion is effective from 12:01 a.m. of a Saturday or holiday until 12:01 a.m. of the next day following a Sunday or holiday.

Theoretically, it would have been preferable to make the Saturdays, Sundays, and holidays exclusion from computation of free time dependent upon whether loading or unloading activities are actually being conducted at the shipper's docks on those days. However, such an exclusion would necessitate extra recordkeeping and, as a practical matter, could result in a significant enforcement problem because of its potential for abuse and preference. Presumably this partly accounts for the Saturday exclusion in rate

bureau rules. While there was limited opposition to excluding any days from the free-time computation, it was discounted since it is unfair to penalize the large percentage of the Nation's shippers who simply do not conduct loading or unloading activities on these days. It should be noted that this exclusion is only with respect to free time, and thus has no bearing on the time computation once free time has run. For these later computations section 4(a), *infra*, should be consulted.

36. *Section 3(a)(3).—Commencement of free time.*—This section is derived from rate bureau detention rules. It simply follows the policy adopted in the immediately preceding section, and, therefore, provides a time for commencing the free-time computations for a vehicle spotted on a Saturday, Sunday, or holiday. Eight a.m. was selected because it more closely relates to normal business hours at shipping facilities.

37. *Section 3(a)(4).—Reloading.*—The standard rate bureau detention rule serves as the model for this section. By running free time for loading and unloading consecutively the section resolves what would otherwise be a potentially unmanageable computation.

38. *Section 3(b)(1).—Termination of spotting and notification.*—The proposed rule is the source of this section; standard rate bureau detention rules do not have an equivalent provision. Termination of spotting time is made dependent upon the carrier's receipt of notification. It should not depend on the actual time of pickup lest the carrier, under the right business conditions be in a position to delay pickup. Section 4(b), *infra*, is phrased to curb any comparable possibility of abuse by shippers.

Considering the widespread use of telephone notification, we find carrier receipt of such notification to be an adequate and equitable means of handling the termination of spotting. Accordingly, the revised rule omits the mandatory written confirmation requirement although the carrier is given the option to request written confirmation. As one respondent pointed out, written confirmation of verbal instructions is not currently required by most major rate bureau detention rules. The written option may be employed by a carrier on a regular basis as part of its ordinary business practice or as circumstances and past conduct may warrant—provided it is not used as a form of harassment.

39. *Section 3(b)(2).—Converting.*—As its counterpart with respect to vehicles with power units, this section is taken almost verbatim from standard rate bureau detention rules and serves the

same general purpose. It is intended to cover the infrequent occasions in which shippers may convert from spotting back to carrier loading or unloading.

40. *Section 3(c)(1).—Prearranged Scheduling.*—This section is taken from the proposed appendix A, and parallels the wording and structure used therein since the same considerations apply to both rules. Prearranged scheduling was added to this rule not principally to aid the shipper in reducing potential detention, but rather to make the two rules parallel and recognize circumstances which may make such scheduling more efficient and advantageous.

41. *Section 3(c)(2).—Late Arrival.*—This section was developed to provide a starting time for the late arrival of scheduled trailers. The potential abuses inherent in late arrivals of vehicles with power are not present with respect to spotting, so parallel precautions were not deemed necessary.

42. *Section 3(c)(3).—Early arrival.*—The source of this section, like its counterpart in the provisions governing detention of vehicles with power units, is section 2(a) of the proposed appendix A. Since prearranged scheduling has been added to the revised rule, this section is warranted in order to preclude disputes relating to the early arrival of a vehicle.

Section 4.—Charges.—This section was enlarged to include all potential charges. The separate treatment previously accorded loading and unloading was found unnecessary and therefore was eliminated. The charges reasonably reflect current standards and the cost and penalty elements.

43. *Section 4(a).—General detention charges.*—The format of this section is derived basically from rate bureau detention rules. While the proposed rule had treated loading and unloading separately in order to accommodate the concept of constructive placement, the adopted rule rejects this concept. A trailer is either spotted on the premises of a shipper (or on premises designated by the shipper or its agent) and is in the actual possession of such, or is in the possession of the carrier: there is no in between. Thus, if a vehicle is placed on premises made available by a shipper or its agent for the convenience of the carrier, and that vehicle is subsequently used by that shipper, then free time for spotting begins at the time the vehicle was initially placed on the premises. Since there is no other reason to support different treatment, the charges under loading and unloading are merged together as in standard rate bureau detention rules.

The adopted rule has a slightly more graduated approach to the maximum charge than the typical rate bureau detention rule. The adopted rule like the proposed rule (appendix B of the Notice) reaches maximum after the fourth day, while rate bureau rules reach maximum after the second day. However, the adopted rule by placing the third day of detention in a higher charge bracket is slightly higher than the proposed rule. The proposed appendix B and rate bureau rules assess detention charges for Saturdays as soon as free time expires. The adopted rule charges for Saturdays but only after the fourth day, when the maximum charge has been reached. Sundays and holidays would not have been subject to charges under proposed appendix B, while rate bureau detention rules typically charge for Sundays and holidays after the second day of detention, when the maximum charge is reached. The adopted rule takes an intermediate approach by charging for Sundays and holidays after the fourth day, when maximum charge has been reached. This change is based on the fact the detention is a penalty, and a party detaining a vehicle in excess of five days must be prepared to be penalized fully. The charges applied are comparable to current rate bureau levels.

44. *Section 4(b).—Delay in trailer pickup charges.*—The proposed rule is the source of this section; rate bureau detention rules do not contain a comparable provision. When the carrier's employee and power unit as well as the spotted trailer are detained at the time of pickup in excess of 30 minutes, there exists a clear situation of detention of vehicles with power units. In recognition of this, the section assesses an additional charge, applicable regardless of whether detention was in fact incurred from spotting in excess of 24 hours. This charge is for detention of vehicles with power units commencing from the arrival time and without any free time. This section also penalizes false or mistaken notification. If, following notification, carrier's employee and tractor arrive and pickup of the trailer is not completed within the prescribed 30 minutes, and such delay is not attributable to carrier's employee, then the ordinary truckload detention charges will be assessed from the time of arrival and without free time.

45. *Section 4(c).—Strike interference charges.*—This section parallels the proposed rule and typical rate bureau detention rules. As worded, if a shipper obtains the consent of striking parties for the pickup of a loaded or empty trailer, then the impossibility requirement is not met and strike interference charges cease to

accrue upon notification to the carrier. Similarly, if a carrier obtains the consent of striking parties to pick up a loaded or empty trailer, then the impossibility requirement is not met and the ordinary detention charge for vehicles without power units will accrue from the time that the carrier has notified the shipper of its willingness to make the pickup. In all other instances the strike interference charge will be in effect. The two exceptions to the section were deleted, since the concept of constructive placement was eliminated and no need appears for the continuation of former Note B.

46. *Section 5.—Records.*—Since the standard rate bureau detention rule for vehicles without power has a recordkeeping section and several parties have requested such we have inserted a mandatory recordkeeping section for all spotted trailers and vehicles converted to spotting because we also find it essential for control and enforcement purposes. As with the recordkeeping section for vehicles with power, the entries provide the information necessary to enable a complete and accurate recomputation of the detention charge for any truckload shipment. Where a vehicle is subsequently converted to spotting, it will have two detention records, each of which shall be maintained by carrier.

APPLICATION

The Notice specifically excepted from this proceeding motor common carriers of property "transporting exclusively, (1) household goods, (2) commodities in bulk in tank trucks, (3) heavy and specialized commodities or articles requiring handling, and (4) articles picked up from or delivered to railroad cars having prior or subsequent transportation by rail." The consensus of the parties opposes the above wording contending that it departs from Commission practice and unfairly penalizes carriers not "exclusively" engaged in the transport of such goods. We concur; an exemption is only appropriate when the needs of a specific shipment are so specialized that no useful purpose is served by its being subject to the detention rule. To distinguish between carriers because some are *primarily* engaged in transporting given articles while others are *exclusively* so engaged confers an undue advantage on the latter and defeats the rationale behind detention with respect to specific shipments. All requests for exemptions were considered on the basis of this rationale and the peculiarities of each.

The exception for commodities transported in bulk was extended to include "dump trucks, vehicles pneumatically unloaded, and

other self-unloading vehicles." Since the free time allocated for unloading these vehicles bears little relationship to their actual shipment weight, and little can be done to expedite the process which in any case is of relatively short duration, we also agreed that no useful purpose would be served in making the rule applicable to them. The exemption is limited, however, to vehicles that totally load or unload themselves with the carrier's driver basically preparing the vehicle and monitoring the process. Thus for example a vehicle with a tail-gate lift would not be included because while loading and unloading are facilitated, it is not a completely automatic process. The request that the exemption be altered to "commodities transported in dump vehicles" rather than "commodities in bulk" was found clearly unwarranted since it would create arbitrary distinctions with respect to the rule's application.

The exception for "heavy and specialized commodities or articles, requiring special handling" was extended to specify that the commodities be "outside the scope of the certificates of general commodities motor common carriers." In *Motor Vehicles—Idaho, Nevada, and Utah Origins*, 318 I.C.C. 859, 864 (1963) we recognized and stated that "[i]n the early days of regulation heavy haulers and general commodity carriers were not considered competitors for the same traffic, but more recently it has been made clear that the permissible fields of service of these types of carriers are not actually mutually exclusive and that in many instances they may be competitive as to the same traffic." Because of this competition a disadvantage would otherwise accrue to general commodity motor common carriers in those "gray areas" where authorities overlap. Furthermore, it is illogical and inconsistent to make the application of detention charges for identical shipments dependent upon the type of authority held by the carrier, and such treatment would defeat the purpose of the detention rule itself. As revised, this exemption also provides for oilfield and so-called "Mercer" carriers.

The exception for "livestock other than ordinary" was clearly warranted from its particular circumstances. However, the request made by the Department of Defense (DOD) for additional free time and lower charges for shipments of explosives was not found justified. The request did not adequately explain why DOD warranted such extraordinary treatment over what ordinary shippers of explosives are accorded nor why the motor common carrier industry should be required to grant special consideration to DOD movements. The requests for special treatment or exceptions for

iron and steel, brick and other refractory products, salt, and bulk commodities in packages on flat-bed vehicles was obviated as a result of the modifications in the proposed rule including the addition of a special provision for palletized shipments, flat-bed, and open-top vehicles. The household goods exception is defined and interpreted in CFR §1056.1(a), (b) (1975). For explanation of the exception at marine terminal facilities see the discussion of section 1(d), *supra*, and for the trailer-on-flatcar exception, reference may be made to the Commission's order of March 11, 1974. The exception requested for meat packers and shipments of other perishable goods requiring temperature control was found not justified on the basis of the facts presented.

VI Summation

The uniform nationwide truckload and volume detention rule adopted herein combines features from both the proposed detention rule and current rate bureau detention rules with new initiatives devised to improve detention practices. In this respect, the suggestions of the parties proved to be of particular value. The rule recognizes the penalty nature of detention, and consequently the importance of maintaining charges at a level sufficient to deter the waste caused by detention. We shall also endeavor to keep abreast of such technological changes as may necessitate modifications in the rule itself.

The rule greatly simplifies detention from the shipper's viewpoint by reducing the welter of confusing rules, charges and exceptions down to one highly structured, comprehensive rule and one set of charges applicable nationwide regardless of the origin or destination of the shipment. In facilitating automation, operational efficiency, and greater accountability over charges and practices, the uniform rule benefits the public and reduces the present confusion and uncertainty over detention practices. In excluding the time allocated for coffee breaks, meal periods and other breaks into a self-regulating system, it resolves this common source of friction between shipper and carrier. Additionally, by resolving such issues as liability for payment of detention charges and the concept of spotting, the rule eliminates certain past areas of contention.

The rule is designed to curb current detention abuses while establishing more equitable detention provisions. It relieves shippers of redelivery and storage charge penalties in those instances when the pickup or delivery cannot be completed in

normal business hours and free time has not expired. Carriers are protected in two major areas: (1) by assuring all shippers, regardless of size, the equal right to prearranged schedules with respect to spotting or ordinary pickup and delivery, and (2) by eliminating the many unsubstantiated, specific exceptions originating from shipper manipulation or collusion. The rule attempts to minimize opportunities in which parties may, through collusion, defeat its purposes. While this rule and all rules are to varying degrees dependent upon those it regulates to abide by its spirit and advance its goals, it does have a comprehensive, expanded recordkeeping section that will enhance the Bureau of Enforcement's ability to monitor the new system. In addition the rule was drafted so as to reach an equitable balance among the numerous opinions expressed, and in so doing, give each class of parties an interest in the success of the rule.

VII Ultimate Findings

We find that a uniform nationwide detention rule for common carriers of property by motor vehicle is in the public interest, necessary for economical and efficient transportation service, and necessary to ensure detention without unjust and unreasonable practices, unjust discrimination and undue preference and prejudice. We further find that the regulations and charges governing the detention of motor vehicles-nationwide, as set forth in appendix V of this report, are reasonable, lawful, and necessary and should be prescribed as Part 1307.35(e), Chapter X of Title 49 of the Code of Federal Regulations.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

APPENDIX I

List of parties filing representations

I. Motor carriers.
  1. Rebo Transit, Inc.
  2. Clay Hyder Trucking Lines, Inc., and Commercial Carrier Corporation (a joint statement)
  3. Schwerman Trucking Co.
  4. David Tesone Trucking, Inc.

5. Pirkle Refrigerated Freight Lines, Inc.'
6. Wills Trucking, Inc.'
7. Frozen Food Express, Inc.
8. Hennis Freight Lines, Inc.
9. Pacific Motor Trucking Company
10. Wilson Trucking Corporation
11. Ruan Transport Corporation
12. Michigan & Nebraska Transit Co., Inc.
13. Shaffer Trucking, Inc.
14. Beaver Transport Company, Central Transport, Inc., Coldway Food Express, Inc., Colonial Fast Freight Lines, Inc., Colonial Refrigerated Transportation, Inc., David Graham Company, Fredonia Express, Inc., Lott Motor Lines, Inc., Orbit Transport, Inc., Riggs Food Express, Inc., Subler Transfer, Inc., and Henry Zellmer (a joint statement)
15. Curtis, Inc.
16. Jones Transfer Company
17. Victor Transit Corporation
18. Fry's Horse Transportation, Inc., Dunmire Bros., Inc., Cloverleaf Farms Vans, Inc., Hull & Smith Horse Vans, Inc., Sallee Horse Vans, Inc., Thompson Horse Transportation Service, Inc., and Nationwide Horse Carriers, Inc.' (a joint statement)
19. Tajon, Inc.'

II. Motor carrier associations and rate bureaus:
1. Oil Field Haulers Association, Inc., and Oil Field Haulers Conference of American Trucking Associations, Inc. (a joint statement)
2. Motor Carriers Tariff Bureau, Inc.
3. Local and Short Haul Carriers National Conference
4. Steel Carriers Conference
5. The New England Motor Rate Bureau, Inc.'
6. Southern Motor Carriers Rate Conference, Inc.'
7. Central & Southern Motor Freight Tariff Association, Inc., Central States Motor Freight Bureau, Inc., Niagara Frontier Tariff Bureau, and Rocky Mountain Motor Tariff Bureau, Inc.' (a joint statement)
8. Steel Carriers' Tariff Association, Inc.'
9. Pacific Inland Tariff Bureau
10. The Eastern Central Motor Carriers Association, Inc., and Middlewest Motor Freight Bureau' (a joint statement)
11. Common Carrier Conference—Irregular Route'
12. Middle Atlantic Conference'

III. Shippers:
1. Grain Processing Corporation
2. Swift & Company and Derby Foods, Inc.'
3. The Grand Union Company'
4. Certain-Teed Products Corporation
5. Morton Salt Company
6. ITT Continental Baking Company, Inc.
7. Westinghouse Electric Corporation
8. General Mills, Inc.

9. Reynolds Metals Company
10. Coca-Cola Company
11. United Brands Company
12. Ford Motor Company
13. The Nestle Co., Inc.
14. The Great Atlantic & Pacific Tea Company, Inc.'
15. Acme Markets, Inc.'
16. Purex Corporation
17. Geo. A. Hormel & Co., Oscar Mayer & Co., John Morrell & Co., and The Rath Packing Company (a joint statement)
18. Texaco Inc.

IV. Shipping associations:
1. Salt Institute
2. American Retail Federation'
3. Beaumont Chamber of Commerce
4. Grocery Manufacturers of America, Inc.
5. Motor Vehicle Manufacturers Association of the United States, Inc.
6. Canned Goods Shippers Conference
7. National Retail Merchants Association
8. Texas Industrial Traffic League
9. Drug and Toilet Preparation Traffic Conference, Eastern Industrial Traffic League, Inc., and The National Small Shipments Traffic Conference, Inc.'
10. National-American Wholesale Grocers' Association
11. National Industrial Traffic League
12. Asphalt Roofing Manufacturers Association
13. National Association of Food Chains'

V. Governmental interests:
1. Department of Defense
2. General Services Administration
3. Interstate Commerce Commission-Bureau of Enforcement'

VI. Other interests:
1. The Port Authority of New York and New Jersey
2. International Association of Refrigerated Warehouses, Inc.'
3. Ramcon, Inc.
4. Professional Drivers Council for Safety and Health

APPENDIX II

The representations

I Motor carriers:

1. Rebo Transit, Inc.—Rebo submits that the rulemaking is timely, and that a nationwide simplification of carrier tariffs is economically desirous. It supports the

'These parties have also filed statements in reply to the initial statements submitted by other parties. An additional reply statement was filed by the Federal Maritime Commission which did previously participate in this proceeding.

concept of detention to inhibit the use of motor vehicles as temporary warehouses, prevent undue delay so as to allow drivers time for subsequent prearranged schedules, and to foster maximum utilization of vehicles through multiple daily loading and unloading. It contends that the proposed free times are excessive, and that for maximum vehicle utilization 60-minute reductions should be made in each. Rebo recommends specific provisions for palletized shipments with free time not to exceed 2 hours. Additionally, it suggests that with regard to the truckload rule the time specified by the driver should be binding where the shipper refuses to sign the carrier's record, that a nationwide detention charge of $50 per hour be prescribed to provide a real penalty, and that detention charges be collected when they occur and be subjected to a check through an Interstate Commerce Commission compliance survey.

2. *Clay Hyder Trucking Lines, Inc., and Commercial Carrier Corporation.*—Both Hyder and Commercial are irregular-route common carriers. Conceptually, they believe a nationwide rule would benefit the motor carrier industry but find the proposed rule ill adapted to its purpose. They maintain that different commodities and different manners of shipping require different rules, and that exclusions from the rule should not be based upon the type of carrier but by the type of commodity being transported. The carriers contend that free time in excess of 4 hours on 75 percent of their traffic would inevitably result in the need for increased charges. They suggest that assessing charges in 15-minute increments is impractical and could lead to numerous arguments. They claim that detention time should run consecutively without interruption for weekends or nonworking hours especially with regard to perishable freight. The carriers believe that tariff authorization is necessary for making prearranged scheduling, find a need for prearranged scheduling particularly in the perishable food industry, and feel that a charge should be established for the service.

3. *Schwerman Trucking Co.*—Schwerman transports bulk products in tank trucks and in packages on flat-bed vehicles. It contends that 6 hours of detention time for shipments in excess of 36,000 pounds is excessive when applied to unloading packaged products on flat-bed vehicles; its average unloading time for such shipments is 1.99 hours. It requests an exemption for such shipments warning that significant increases in revenue would otherwise be required if shippers took the full free time the proposed rule provides for these shipments.

4. *David Tesone Trucking, Inc.*—Tesone transports bulk commodities in dump vehicles. It contends that 6 hours of free time for loading/unloading commodities in dump vehicles is excessive. It requests an exclusion for dump trucks or a maximum free time of 1 hour.

5. *Pirkle Refrigerated Freight Lines, Inc.*—Pirkle primarily transports foodstuffs between points in the Midwest and west coast. It opposes a uniform nationwide detention rule contending that the number of different types of carriers is boundless and when added to differences in geography and operating conditions a uniform rule becomes impossible to construct and detrimental to the carrier and the shipping public. Pirkle contends that flexibility is essential to carrier operations and thus any mandatory prearranged scheduling would be a severe handicap especially to the irregular-route carrier. It sees nothing unlawful about a carrier using its managerial discretion to arrange pickup and delivery appointments for its convenience or that of its customers since the act and the rules and regulations provide shippers with adequate recourse. Similarly, it believes that rates have traditionally been established by carriers and that this policy should continue.

6. *Wills Trucking, Inc.*—Wills is a common carrier predominantly involved in transporting various commodities in dump vehicles. It avers that unloading by dumping generally takes 30 minutes, and thus to provide 6 hours would reward inefficiency, destroy the incentive to make further technological improvements, and result in significantly increased costs and consequently higher revenue needs.

In its reply statement Wills cites the support a dump truck exclusion has received from other respondents, language in *Detention of Motor Vehicles—Middle Atl. & New England*, 318 I.C.C. 593, 606 (1962), and the reply statement of the Commission's Bureau of Enforcement supporting the exemption.

7. *Frozen Food Express, Inc.*—FFE is an irregular-route motor common carrier engaged in the transportation of perishable commodities. It opposes a uniform nationwide rule contending that it will be too difficult to enforce, too conducive to argument and ill will, and too prejudicial to the regulated motor common carrier industry in relation to other phases of the industry. In addition FFE contends that problems of each type of carrier are too unique to cover with one broad rule.

8. *Hennis Freight Lines, Inc.*—Hennis announces its concurrence in the joint statements filed on behalf of the Southern Motor Carriers Rate Conference and other rate bureaus.

9. *Pacific Motor Trucking Company.*—Pacific is a regular-route motor common carrier of general commodities. It maintains that its practice of scheduling deliveries without specific tariff authorization is not discriminatory, unlawful, or otherwise improper. In support of its assertion it lists c.o.d. shipments, residential deliveries, deliveries to construction sites, large deliveries to relatively small businesses, deliveries to groceries as examples where the appointment system may be profitably employed as a common sense, efficient approach by service-oriented carriers to avoid undue difficulty and delay.

10. *Wilson Trucking Corporation.*—Wilson is a full-service general-commodity motor common carrier. It supports a uniform nationwide detention rule to facilitate the proper assessment of charges. Wilson supports mandatory prearranged scheduling for shipments aggregating in excess of 10,000 pounds because it would allow expedited loading or unloading of equipment whereas for lower weights it would be burdensome and economically impractical. The carrier concurs in the need for tariff authorization before such practices may be employed. It avers that the level of charges should not be uniform but be allowed to vary so as to reflect carrier costs in any particular area.

11. *Ruan Transport Corporation.*—Ruan is a motor carrier specializing in the transportation of commodities in bulk in dump trucks and other specialized equipment not classified as tank trucks and in bags on flat-bed vehicles. It maintains that the proposed free time applicable to dump trucks and flat-bed vehicles is excessive and bears no relation to their method of unloading; just the time for unloading bags from flat-bed trucks averaged 1.7 hours. Ruan warns that the increased labor costs resulting from the excessive free time would necessitate significant rate increases. Therefore, it proposes that the exemptions include hybrid carriers who transport commodities in bulk in dump trucks and packages. It asserts that when prearranged scheduling is part of a carrier's normal service, offered on a nondiscriminatory basis and performed with reasonable dispatch it is consistent with section 2(a) of the Contract Terms and Conditions of the Uniform Straight Bill of Lading and consequently does not require prior tariff authorization. With regard to detention charges, it feels that a prescribed charge would not reflect carrier cost levels in various sections of the country and, therefore, be unjust and unreasonable.

12. Michigan & Nebraska Transit Co.—M&N supports a uniform nationwide detention rule provided the Commission is empowered to penalize all parties including those shippers who abuse its terms. It requests a clarification of the term prearranged scheduling observing that the practice by necessity has become widespread in the food industry and continues to expand because it is mutually beneficial. However, prior tariff authorization allegedly is unnecessary since the practice has been provided for a long time and is free and mutually beneficial whereas tariff publication would not eliminate opportunities for preference, prejudice, or discrimination. M&N objects to the exclusion of weekends and holidays in computing detention time contending that it operates 7 days a week 52 weeks a year and that many shippers load and unload on Saturdays. It proposes that time computations commence at the time of rescheduled delivery or upon notice of arrival of the vehicle if for any reason a carrier is more than 30 minutes late, and that charges be the same for vehicles with or without power or driver otherwise the small carrier and irregular-route carriers will suffer a competitive disadvantage in relation to the larger carrier with extra trailers and available terminals. It suggests a reasonable charge in the neighborhood of $150 per day and $20 per hour.

13. Shaffer Trucking, Inc.—Shaffer is an irregular-route motor common carrier primarily engaged in transporting foodstuffs. It expresses doubt that a uniform rule can be devised for both regular- and irregular-route motor carriers, and states a preference for detention rules on a case-by-case, carrier-by-carrier basis with the carrier free to establish the rules and charges it believes appropriate. Shaffer observes the difficulty in collecting detention charges under the MAC rule, and suggests that detention charges be guaranteed by the party responsible for paying the freight charge. It recommends that the column for overflow shipment free time be omitted, and that the driver be permitted to observe the loading of spotted trailers to insure that the bill of lading is accurate and the carrier is not subject to subsequent allegations of shortage.

14. Beaver Transport Company, Central Transport, Inc., Coldway Food Express, Inc., Colonial Fast Freight Lines, Inc., Colonial Refrigerated Transportation, Inc., David Graham Company, Fredonia Express, Inc., Lott Motor Lines, Inc., Orbit Transport, Inc., Riggs Food Express, Inc., Subler Transfer, Inc., and Henry Zellmer.—These motor carriers claim that the exemptions for carriers exclusively engaged in any of the four enumerated areas is patently discriminatory against those carriers who perform complete services for commodities in bulk since they may qualify for the exemption 95 percent of the time but not qualify for the exemption as it is presently worded. They propose that the applicability of the exception be by commodity rather than carrier, and that all commodities in bulk regardless of the form in which they are moved be excluded. In opposition to the rule these parties aver that it will penalize shippers who have taken steps to improve their freight facilities by generally providing shippers an incentive to take maximum advantage of the prescribed times, and that the resulting higher costs will consequently pass to the public. The rule, according to these carriers, is too complex, will be disruptive of the transportation system, and will especially disrupt shipments for which stops in transit for partial loading or unloading are required. They insist that the Commission would do better to concern itself with enforcing the present system of detention times and charges. They complain that the rule with its time limits and reporting requirements will unduly penalize the irregular-route motor common carrier, and, therefore, propose that all free times be reduced by two-thirds. With respect to charges, these carriers suggest that the first hour be fixed at a tremendous cost to counter the excessive free time allocated in the proposed rule.

15. Curtis, Inc.—Curtis is an irregular-route motor common carrier specializing in the transport of perishable commodities that require refrigeration. It vigorously opposes section 6 of appendix B of the proposed rule, which curbs the practice of spotting refrigerated trailers, contending that the practice is widespread, more efficient and convenient for the carrier, owner-operator, and shipper, and for the general benefit of the public.

16. Jones Transfer Company.—Jones adopts the statements filed on behalf of Central States Motor Freight Bureau, Inc., Agent, as their own.

17. Victor Transit Corportation.—Victor is an irregular-route motor common carrier engaged in the transportation of low-rated commodities. It opposes a uniform rule contending that the basic differences inherent in the various types and classes of motor common carrier service would result in disasterous consequences to the public and the parties concerned. It claims that the free times are excessive and thus will encourage the use of trailers as temporary warehouses. In addition it will disrupt operations by preventing drivers from meeting prearranged schedules within working-hour limits resulting in substantial delays in accommodating shippers and increases in layover costs. Victor opposes mandatory prearranged scheduling for any volume maintaining that the resulting carrier inflexibility is inconsistent with and detrimental to both the needs of the carrier and public with regard to pickup and delivery times and efficiency in utilization of carrier equipment. In its opinion cooperation and coordination between shipper and carrier vis-a-vis scheduling is mutually beneficial and does not violate the act in which an aggrieved party already has adequate recourse. Lastly, Victor contends that the level of charges should vary depending upon the type of traffic being transported, the type of operation conducted, and the reasonable requirements of the public being served.

18. Fry's Horse Transportation, Inc., Dunmire Bros., Inc., Cloverleaf Farms Vans, Inc., Hull & Smith Horse Vans, Inc., Sallee Horse Vans, Inc., Thompson Horse Transportation Service, Inc., and Nationwide Horse Carriers, Inc.—These motor carriers specialize exclusively in the transportation of horses other than ordinary. They request exclusion from the proposed rule contending that basic differences inherent in their field would make the application of the rule disastrous for them and the public they serve. They refer to the specialized characteristics of their field, the unpredictable nature of horses, and the careful coordination of equipment required in order to distinguish themselves from general-commodity carriers and to illustrate the undesirability of the free-time restraints. They oppose mandatory prearranged scheduling for any volume contending that such would be incongruous with the shipping practices and desires of their shippers and would result in less efficient equipment utilization. In their opinion shippers and carriers may voluntarily coordinate and cooperate on scheduling to their mutual benefit without violating the guidelines of the act. They suggest that the level of the charge be allowed to vary depending upon the type of traffic being transported, the type of operation conducted by the carrier, and the reasonable requirements of the public being served.

19. Tajon, Inc.—Tajon is an irregular-route motor common carrier engaged in the transportation of commodities in dump vehicles. It requests exclusion from the proposed rule contending that 6 hours of free time is excessive for loading and unloading these vehicles and will effectively break the continuity of movements resulting in less efficient utilization of equipment and higher costs.

In its reply statement, Tajon requests that an exclusion apply to "commodities transported in dump vehicles" and not just to "commodities in bulk" since the former is more encompassing while the operative facts are the same.

II. Motor carrier associations and rate bureaus:

1. *Oil Field Haulers Association, Inc., Oil Field Haulers Conference of American Trucking Associations, Inc.*—These oil field and mercer carriers transport extremely heavy, elongated, and cumbersome equipment and commodities which require handling by various types of highly specialized equipment, operators, and vehicles. They maintain that their tariffs already contain fair and reasonable regulations governing vehicle detention and that they have not experienced difficulties in prearranged scheduling. They, therefore, request that the third exception in the second ordering paragraph of the Commission's order of May 22, 1973, initiating this rulemaking be interpretd to also exclude oil field or mercer carriers or in the alternative that a clause be inserted to the same effect.

2. *Motor Carriers Tariff Bureau, Inc.*—MCB proposes that detention provisions presently maintained in the MAC, ECA and CMB detention rules applicable on iron and steel articles and refractory products, be prescribed nationwide. It suggests a clarification of the rule vis-a-vis free time for multiple-shipment deliveries and whether or not recordkeeping applies to all vehicles or only those detained beyond free time. It contends that railroads, freight forwarders, and REA should have been included under this rulemaking proceeding, and it includes for Commission consideration portions of a Michigan rule applicable to iron and steel products.

3. *Local and Short Haul Carriers National Conference.*—The conference recognizes a need for and supports promulgation of uniform motor carrier detention rules. It feels that charges and hours of free time should be determined locally since differences in labor contracts could disadvantage some carriers, and contends that uniform rules on prearranged scheduling will destroy flexibility and thus its operating efficiency. If promulgated the conference contends that it should only be for truckload. LTL would be extremely impractical as there are no definite times and vehicles are loaded with LTL shipments according to route or movement. Hence to meet prearranged schedules would necessitate extra miles and backhauls of trucks not loaded to capacity. According to the conference voluntary prearranged scheduling without tariff authorization is not illegal.

4. *Steel Carriers Conference.*—The conference states its vigorous opposition to the proposed rule observing that a less liberal rule than proposed here had resulted in a lengthy work stoppage of owner-operators in 1967. According to the conference the free time in the proposed rule is excessive and would place the carrier in the position of paying drivers more under their union contract than they could collect under the proposed rule. It requests that iron and steel articles be excluded from the rule or that the maximum free time be 3 hours for movements over 100 miles and 2 hours for smaller movements. The conference prefers that the Commission establish detention guideline for various types of carriers, weights, distances, and commodities, and reject tariffs that do not fall within these guidelines. It suggests that the Commission investigate more extensively and prosecute carriers that fail to assess and collect the detention charges provided in their tariff, and investigate methods to insure that properly assessed detention charges are paid by the responsible party.

5. *The New England Motor Rate Bureau, Inc.*—NEB opposes the prescription of a nationwide uniform rule at this time contending that its own truckload and LTL detention rules have been in effect for almost 10 years and appear to be fair and equitable to both carrier and shipper. It maintains that its rule was developed to accommodate industrial needs in its geographic area and that the country is too diverse for a uniform nationwide rule to be fair. Rather, it suggests that the rulemaking

is an overreaction to undocumented allegations of illegality in prearranged scheduling, and that a uniform rule with prearranged scheduling would not be likely to stop such illegality if it indeed exists. It requests that an in-depth analysis of the complaints be made which may serve to focus attention on the real problem areas. NEB opposes a uniform nationwide rule on prearranged scheduling preferring the regional truckload rule it developed, and contends that weight limitations should also be left to the carriers and their shippers. It contends that implementation of prearranged scheduling for LTL and AQ traffic would cause chaos for motor carriers with their service obligations to the general public and doubts whether the shipping public would even want such scheduling. It requests a comprehensive definition of prearranged scheduling and suggests that informal scheduling is more in the interest of expediency and efficiency than an unlawful practice. NEB rejects the concept of a uniform nationwide charge; it prefers a regional charge in order to accommodate the Nation's diversity and somewhat reflect the costs incidental to the service rendered.

In its reply statement NEB contends that there has been no showing of need to justify prescription of a uniform nationwide detention rule. Based on the Middle Atlantic experience it maintains that enthusiastic regulatory enforcement, even providing penal action for continuous violation, rather than a prescribed rule is the preferable way to solve detention problems. NEB advocates leaving scheduling to the collective bargaining of the interested parties before experienced rate committees. It points to the relatively small number of complaints in support of the present system, and expresses fear that any change could upset the contractual liabilities developed under the bill of lading. It questions the need for the rule if it is simply intended to formalize the everyday system of communications. NEB avers that prearranged LTL scheduling makes even less sense operationally or costwide, that no bona fide need has been shown, and that it is impossible to prearrange a schedule for a peddle truck after the first delivery. It contends that the proposed appendix C lacks definitiveness and a recordkeeping section even if such a section were economically feasible. On the issue of lawfulness, NEB maintains that demonstrative proof has not been developed to indicate that prearranged scheduling without tariff authorization is illegal, but rather asserts that any illegality resulting can be met under existing law. It rejects a prescribed charge contending that under section 216(b) of the act and the concept of the zone of reasonableness, carrier management is the rightful party to make such determinations.

6. *Southern Motor Carriers Rate Conference, Inc.*—SMC deems the prescription of a uniform nationwide detention rule undersirable and unnecessary for so dynamic an industry, and contends that the industry will be thrust into a straitjacket of inflexibility, the public will not be benefitted, sufficient cause does not exist, carrier management will be deprived of its traditional discretion, necessary change would be severely impeded, and variations in carrier operations and in the conditions existing in separate rate territories will not be taken account of. The conference is similarly opposed to an LTL and AQ detention rule. It considers such unnecessary, undesirable, impractical, and impossible to police. It questions how free time and charges can be determined without keeping detailed records. Recordkeeping would be very time consuming requiring the undertaking of extensive driver training and intensive follow-up scrutiny of records and billing; the expenses entailed would exceed the revenue produced. SMC proposes that instead of prescribing a rule the Commission recognize the model uniform rule of the National Advisory Rule Committee (NARCO) as suitable for uniform application leaving the industry free to refine and improve it in accordance with the future needs of industry and commerce.

They aver that much progress has been made toward uniform detention provisions while allowing the bureaus to remain responsive to particular circumstances in their territory and that this is preferable to a prescribed inflexible rule. The conference opposes mandatory prearranged scheduling contending that voluntary coordination between shippers and carriers is common and does not violate the terms of the act so long as the agreement does not constitute a special contract and the carrier's obligation remains to transport with reasonable dispatch in accordance with the terms of the bill of lading contract. Mandatory prearranged scheduling would place an intolerable and unnecessary burden on the transportation industry and aside from the operating difficulties engendered, it would subject the carrier to potentially costly civil liability for damages alleged to result from failure to comply with prearranged schedules. With regard to LTL and AQ shipments, SMC points to the daily variations in routes necessary to accommodate customers, the nature of the "peddle run" and the vicissitudes in daily conditions as making it impossible for a dispatcher to predict arrival times. Even limiting loads to 10,000 pounds would be unmanageable unless all shipments were specially dispatched at greatly increased costs. SMC questions the mechanics of working out prearranged truckload and volume schedules as well and in particular with reference to the irregular-route carrier. The conference contends that no one level of charge should apply nationwide, rather, carriers should be free to adjust charge levels according to existing circumstances, equipment availability and shipper practices in a given area, and that in any event the SMC charge should be the minimum. It requests that if prescribed the Commission should not penalize the regular- and irregular-route motor common carrier to the benefit of competing motor carriers who were excluded and competing modes of transportation. SMC makes a section by section comparison between appendixes A and B of the proposed rule and the NARCO rule pointing out the differences and the alleged failings of the former.

In its reply statement SMC repeats many of its arguments, and, in addition, cites the failings of the Middle Atlantic rule. It observes that the consensus of respondents are opposed to a uniform LTL rule for reasons of economics and practicality. With regard to prearranged scheduling, the conference in particular fears that the proposed rule will enable shippers to foist their restrictions and their concepts of normal business hours upon carriers thereby replacing flexibility, compromise, and cooperation with conformance to shipper schedules. It observes that the consensus of respondents clearly opposes prearranged LTL scheduling based upon its impracticality and potential disruptiveness. SMC remains opposed to anything but regional charges and advocates a charge high enough to deter detention. It submits that the free-time brackets are adequate as proposed, already contemplate heavier loads, and cannot extend beyond 6 hours since carriers will start to incur overtime rates of pay. In addition, it acknowledges that while other factors are pertinent to free time, it would take years of study to devise a system to include them and would introduce unmanageable complexity, and that in fairness to the carrier free time should run upon notification of a vehicle's arrival. SMC opposes any incentive plan that gives shippers credit for early release of vehicles contending that excessive bookkeeping would be required and that it misconstrues that nature of free time which is designed to provide adequate time for expeditious loading or unloading and not to give shippers or receivers unlimited control of the vehicle for the duration of free time.

7. *Central & Southern Motor Freight Tariff Association, Inc., Central States Motor Freight Bureau, Inc., Niagara Frontier Tariff Bureau, and Rocky Mountain Tariff Bureau, Inc.*—These bureaus deny charges that the current detention rules have led to unlawful concessions and rebates in violation of section 216 of the act. They contend

that the charges have not been supported, nor has it been shown how a uniform nationwide rule would remedy the situation if it is in fact the result of a carrier failure properly to apply their detention provisions. They state their support for reasonable uniform detention rules by region to the extent permitted by operating conditions and competitive circumstances and in the form of a uniform terminal services rule including detention with charges varying by region. They contend that extensive work and time have been expended on the uniform terminal services rule currently outstanding on all bureau dockets, and that such a rule, because it is capable of change and development, preserves flexibility, managerial discretion, and the carriers' traditional right to initiate rates and adopt policy. In contrast, a prescribed rule is certain to require formal proceedings, result in extended litigation over even the most minor changes, and block badly needed change in any one region when the remainder of the Nation does not face a similar problem. Thus, they argue that compelling circumstances have not been shown to warrant prescription of a uniform nationwide rule; the Commission should conclude that no need for one exists and instead recommend voluntary movement toward uniformity along the lines of two of their exhibits. These bureaus oppose mandatory prearranged scheduling contending that the daily interaction between shipper and carrier at the local level promotes the most efficient and economic freight operations by providing the flexibility needed to schedule on a day-to-day basis. Since general-commodity motor common carrier terminal operations especially for LTL and AQ are so fluid the identity, number of customers, and quantity of freight is never repetitive; the carrier must be free to handle the greatest quantity of freight while expending the least time and energy. These bureaus contend that there is nothing illegal in scheduling pickups and deliveries on a daily basis as dictated by the routine of traffic flow, advanced knowledge, or other current means without tariff authorization. Such a practice is more efficient and the only basis on which carriers may operate. They maintain that charges are aimed primarily at deterring detention and secondarily at recompensating and, therefore, must be high enough to provide an incentive, that carrier costs vary by region as does the effectiveness of the detention charge, and that the present structure reflects the relative differences of carrier costs in their region and bears a relationship to the present underlying rate structure. Thus, regional charges that are capable of revision are preferable. They refer to the enormous difference between the Middle Atlantic region requesting the Commission to prescribe a rule and the prescription of a uniform nationwide rule that will run the risk of continual controversy or stultification serving to discourage efficiency while passing the added cost onto the Nation's commerce and the public. In contrast, bureau rules are capable of moving toward uniformity while accommodating local differences in operating circumstance and remaining within a detention zone of reasonableness. These bureaus continue their objection to the Commission's decision to exclude from the rulemaking competitive modes of transportation. They object to the exemptions contending that the term "household goods" is ambiguous and may be interpreted to exclude from the rule general-commodity household goods while the exemption for carriers transporting exclusively heavy or specialized commodities or articles requiring special handling is ambiguous and ought to be restricted to those operations involving handling beyond the scope of the certificates of motor common carriers of general commodities so as not to unfairly exempt heavy haulers from the rule when they perform services identical to general-commodity common carriers. These bureaus also point out mistakes, omissions, ambiguities, and inconsistencies in the proposed rule.

In their reply statement, these bureaus tabulate the initial statements of the parties by position and conclude that the record in inadequate. It allegedly fails to reveal the total reaction of the parties because of the complexity of the three rules. Instead of joining the issues the parties either isolate, scrutinize and discuss only those subjects important to them or generalize on the contents as a whole. As a result they contend that the proposed rules have not been sufficiently analyzed by the Commission nor scrutinized by the parties. They are simply a result of the Bureau of Enforcement's desire to utilize mandatory tariff publication as a means to curb enforcement requirements. As such, evasion and enforcement problems will not be legislated away, only strict enforcement through penalty provisions will stop unlawful practices. They observe that the term "reasonable prearranged schedules" is too imprecise and will engender difficulty, and that an LTL rule suffers from a general lack of support and should be shelved unless really needed at some future time. They argue that the Department of Defense has not shown itself entitled to different free-time treatment much less the subsidization of the Nation's commercial shipper. In support of their point, that a uniform nationwide rule would be too inflexible and unresponsive, they refer to the significant differences revealed in a comparison of regional costs for man-minutes per ton at stops and point to the existence of local situations that require exceptions. With regard to free time these bureaus acknowledge that factors other than weight are pertinent but contend that their recognition is unfeasible. If loading or unloading requires more than average free time then the shippers should be charged accordingly rather than forcing the subsidization of the inefficient shipper who tenders truckloads of thousands of separately packaged small pieces. Increasing free time for loads in excess of 36,000 pounds would not discourage detention but rather result in the accumulation of substantial quantities of excess driver time and in spreading a 1 day loading or unloading into two. Both outcomes would necessitate significant rate increases to offset the consequently higher costs and equipment shortages. They oppose consideration of an incentive averaging plan as employed in rail demurrage contending that basic distinctions between rail and motor carrier operations preclude development of similar provisions. These bureaus oppose section 6 of proposed appendix B contending that the record has produced no evidence to support the disruption of spotting trailers equipped with temperature control equipment, rather, it is a long-standing practice that has greatly contributed to the productivity and efficiency of the packinghouse industry. They aver that under neither the common law nor the Interstate Commerce Act is a shipper entitled to have carriers guarantee or schedule deliveries. Furthermore, they dispute the lawfulness of Ford Motor Company's "bullpen" concept, contending the such a practice provides Ford with assembly line precision in pickups and deliveries without the risk of incurring detention for vehicles with power and without the disadvantages inherent in traditional spotting practices. Accordingly, Ford's contention that the obligation to move a trailer from "bullpen" to loading platform where spotting first commences and ceases, as part of the regular line-haul service, is simply devised to relieve it of extra movement costs of additional warehouse space, and is derived from inapplicable rail precedent. The bureaus insist that once a trailer is spotted or dropped at a place designated by shipper, the carrier is released from further obligation to move, load, or unload it. Thus a spotting or dropping arrangement must either result in free time running under detention of vehicles with power or under spotting where the shipper assumes responsibility for all subsequent actions until the trailer is ready for pickup. These bureaus take issue with the Bureau of Enforcement, contending that a uniform rule is no proof that carriers or shippers will take detention more seriously as

illustrated by the example of the Middle Atlantic experience, that the number of complaints received was remarkable for both their relative infrequency and high percentage from the MAC region, and that complaints generally do not automatically justify new rules and regulations. They support the bureau contending that free-time computation should simply be based on the "normal business day" without further qualification to enable shippers to bring about chaos by restricting hours. They disagree with the bureau's interpretation of section 1(e) of appendix A contending that it simply provides the carrier with the right to insist upon a guarantee of detention charge payment from any responsible party prior to delivery, and concur with the bureau's suggestion that free time be computed on the basis of "actual weight in pounds per vehicle stop" and that weights be combined in determining free time for vehicles containing one or more LTL or AQ shipments. They reject the tendency of shipper interests, particularly food chains, to lay all blame on the driver contending that instead of recognizing the physical need for a break or two when loading or unloading 36,000 pounds the shippers use the allegations to conveniently avoid detention charges anticipating that the amounts are too small to justify legal recourse.

8. *Steel Carriers' Tariff Association, Inc.*—SCTA publishes iron and steel articles tariffs for its members in the Northeast United States and notes that a uniform truckload detention rule for iron and steel shipments has existed in MAC, ECA, and CSA territories since 1968. It considers it essential that steel producers have detention rules applied in a uniform manner, and avers that detention rules have been effective in reducing both the number and duration of delays. SCTA firmly believes that prescriptive of a uniform nationwide iron and steel detention rule will benefit all carriers and shippers by reducing equipment delays and alleviating shortages in equipment, and in addition will insure just and equal treatment for all shippers and motor carriers. It requests that the Middle Atlantic iron and steel rule, which limits truckload free time to 3 hours, meal time to 1/2 hour, and charges to $13.70 per hour and $3.43 for 15-minute segments, be prescribed nationwide for such shipments. These limitations were instituted with Commission approval to meet the needs of iron and steel carriers as well as of their owner/operators. SCTA contends that the rule should apply to all motor common carriers regardless of operating certificate and particularly to heavy haulers when competing with motor common carriers in the transportation of iron and steel articles. It interprets the heavy-hauler exemption to cover exclusively heavy and specialized commodities or articles requiring special handling and not iron and steel articles. It does not oppose the LTL detention rule but requests an exemption for iron and steel articles contending that the benefits accruing on a relatively few shipments would be far outweighed by the expense of billing and collecting.

In its reply statement SCTA restates its position and additionally requests that its proposed separate uniform nationwide truckload detention rule for iron and steel articles be made applicable to brick and refractory products and related articles because these frequently are the backhauls for SCTA members and are handled by the same equipment. It opposes voluntary solutions to the detention problem contending that they are never adequate. SCTA maintains that the Commission has responded promptly twice in the past to requests for needed changes in Middle Atlantic detention rule. It contends that if charges are determined according to the size and category of equipment involved, it could result in discriminatory practices by shippers and carriers as to whom would be furnished what and the source of arguments over the applicable charges. It suggests that prescription of the proposed rule on iron and steel articles with its more liberal time provisions and lower charges would result in severe labor disturbances similar to when the original Middle Atlantic rule went into effect.

9. *Pacific Inland Tariff Bureau.*—PITB notes the exclusions existing to the Middle Atlantic rule and concludes that if uniformity is unobtainable in one territory then a uniform rule, fair and equitable under all the different conditions, could not be devised on a nationwide scope. It suggests that such uniformity ignores differences in the character of traffic and the various types of carriers and shippers and fails to account for differences in operating condition particularly with respect to the terminal. Instead, it suggests uniform detention rules by territory reflecting costs and operating conditions in the territory and applicable to all territorial traffic regardless of its source or destination. PITB opposes mandatory prearranged scheduling provisions contending that it places an impossible burden on the carrier with respect to its control of operating efficiency and costs. However, it has no inherent objection to the principle if carefully considered and developed, and no objection to the proposed provisions since they simply require entry into "reasonable" prearranged schedules which it interprets as mutually satisfactory to carrier and shipper in terms of the needs of each. With regard to spotting, it states that the relationship inherently requires prearranged scheduling arrangements. PITB contends that prearranged scheduling for LTL shipments under 10,000 pounds is unfeasible since carriers cannot precisely time vehicles making numerous stops along specific routes in view of changes in traffic and weather conditions, daily variations in the number and weight of shipments, and the existence of unforeseen delays disrupting the schedule for all subsequent stops. It contends that if prearranged scheduling is for the benefit of the shipper rather than for the convenience of the carrier it must be provided for by tariff, and suggests that as a practical matter, tariff provisions are desirable to avoid potential discrimination. It opposes prescription of charges or free times contending that they should be related to costs and conditions in the various territories and be capable of change to reflect the dynamic economic forces in the market. In addition, they should be high enough to be an effective deterrent while preserving the carrier's right to publish and file charges subject to the Commission's suspension and investigation powers.

10. *The Eastern Central Motor Carriers Association, Inc., and Middlewest Motor Freight Bureau.*—ECA and MWB point out that the detention rules published by most motor carrier rate bureaus already are substantially uniform in content. Accordingly, the differences that do exist in the form of specific exceptions or wholly separate rules are compelled by the needs of individual carriers to meet specific competitive situations frequently involving specialized motor carriers, freight forwarders, REA, rail TOFC, private carriage or other available transportation services in both interstate and intrastate commerce. These bureaus aver that any unlawful practices currently existing do not arise from the content or lack of uniformity in the various detention rules in anywhere near the degree that they arise from confusion resulting from specific, local competitive conditions. Therefore, they urge the opening of this proceeding to include alternative modes of transportation in competition with the motor carrier. They oppose prescription of a uniform rule for truckload and volume shipments contending that no need has been shown and that such prescription, whether mandatory or not, would create innumerable regulatory problems and solve none. Similarly, they oppose prescription of an LTL-AQ rule noting that the desirability of such rules are still in question and that they may even prove counterproductive. ECA and MWB oppose mandatory prearranged scheduling. They argue that the present rate bureau tariff structure including provisions for arrival notice, storage, and redelivery provides all the flexibility needed to cope with the multitude of operating practices affecting the pickup and delivery of freight and are designed to

meet public need to the extent prearrangement is possible and practical. They maintain that specific problems should be worked out by the parties since prescription of any rule would be totally unworkable and contrary to an adequate and efficient transportation service. Concerning the level of charges, they suggest that while costs and overhead profit could be calculated to derive a charge, such a procedure emphasizes the revenue aspect, whereas detention charges are designed to reduce delay and increase efficiency. As such the charge is governed by the local circumstances where detention occurs and the bureaus have established their charges in consideration of the many relevant factors. The Commission could not cope with the infinite variety of circumstances at origins and destinations which comprise the total territory served by the motor common carrier. The bureaus request that if a detention rule is prescribed it assess detention against the consignor in the case of loading and against the consignee in the case of unloading.

In their reply statement, these bureaus contend that the wide variation in views and positions expressed in the initial statements suggests that instead of favoring uniformity the parties in reality desire recognition of special circumstances requiring the individual treatment by way of exceptions or local rules. ECA and MWB warn that by means of a uniform nationwide rule the Commission will be injecting itself into the tariff publishing business—a role for which it is neither equipped nor prepared. As a result, the Commission will find itself inundated with applications for changes, modifications, exceptions, or amendments to the rule in order to resolve the numerous specific problems that inevitably arise and to enable the industry to keep up with changing business conditions.

11. *Common Carrier Conference—Irregular Route.*—The Conference supports uniformity in detention rules citing such advantages as simplification, emphasis on prompt equipment release, termination of temporary warehousing practices with carrier vehicles, uniformity in application, and maximum utilization of equipment. It avers that in the absence of uniformity the door is open to shippers using one carrier against another to minimize billing. In addition, if appropriately enforced, it contends that a uniform detention rule will make the collection of detention charges as routine as the collection of applicable tariff charges for transportation. The Conference requests that free time be reduced by at least an hour in each weight category and more than that on palletized traffic. It urges that proposed appendix A provide that the time specified by the driver on the carriers record be binding when the shipper refuses to sign. It notes that prearranged scheduling with 30 minutes leeway is subject to numerous obstacles and can result in indeterminate holding of equipment if no provision exists for rearranging missed schedules. It suggests that carriers be left to decide whether or not to provide that service, but that if required, the provisions be limited to (1) methods of arranging schedules, (2) charges for prearranging with method of computation, (3) language as to allowable revisions of schedules, and (4) limitations on the length of time equipment can be held if the schedule has not been maintained. It suggests that the rule be clarified with regard to partial deliveries en route.

In its reply statement, the Conference adheres to its former positions and advocates appropriate enforcement provisions to insure uniform payment and collection.

12. *Middle Atlantic Conference.*—MAC finds a need for requiring all motor common carriers to maintain uniform rules to govern the assessment and collection of vehicle detention charges. It finds a need for prearranged scheduling with regard to truckload and volume shipments, and states its lack of objection to the proposed

scheduling provisions of appendix A noting that they are identical to the ones formerly prescribed by the Commission. It observes that late afternoon schedules and appointments at irregular times can wreak havoc with carrier operating schedules particularly when in conjunction with restrictive teamster rules. It regards the prearranged scheduling provisions for spotted trailers as inherently necessary and the free time as adequate. It notes that the prearranged scheduling provisions of the proposed LTL rule reflect the present provisions of the MAC rule and supports it provided scheduling remains limited to 10,000 pounds or more. It alleges that prearranged schedules for lesser shipments would be impractical and prohibitively expensive in view of the nature of LTL pickup and delivery service. MAC asserts that prearranged scheduling frequently is mutually advantageous, but that without tariff provision authorizing such there is obvious potential for discrimination and abuse. It opposes a prescribed charge noting that the charge prescribed for MAC in 1965 has not kept pace with the increases in operating costs and consequently is not functioning as an incentive to reduce detention. In addition, it argues that charges ought to be related to area operating and labor costs, allow carriers to recover full costs plus a reasonable profit for use of carrier personnel and equipment, and reflect a penalty element—not as a source of revenue but simply to be effective as a detention charge. MAC observes that while a uniform rule has many beneficial effects it will neither eliminate detention nor force payment of charges. According to the conference, the collection of charges is a serious problem particularly with delinquent shippers attempting to capitalize on litigation costs by offering settlements at reduced percentages of the total. MAC asserts, that these practices can easily result in discriminatory application of existing detention provisions. To remedy this detention problem and others caused by shipper decisions with respect to the type of packaging or special methods of unloading, MAC requests that the responsibility for delay be shifted so as to make detention charges apply whenever the delay is not attributable to the carrier. Lastly, MAC urges the responsibility for payment of charges be on the party causing the delay, and when not a party to the bill of lading contract, then on the party responsible for the payment of freight charges. Appended to MAC's initial statement are the verified statements and exhibits of 15 MAC carriers. These carriers principally recount their collection difficulties under the MAC rule, and offer suggestions for strengthening the proposed rule.

In its reply statement, MAC concludes that exemptions to the rule should be by commodity and not by carrier otherwise the rule would be patently disciminatory and contends that exempting commodities in bulk when in packages would patently discriminate against other packaged traffic. It also contends that exclusion of TOFC and heavy haulers when handling traffic also transported by general-commodity-type carriers is patently discriminatory. MAC request that provision be made for palletized shipments and for retention of the present practice of making rate concessions to such pallet users in exchange for reduced free time for loading and unloading. MAC asserts that the quantities of free time are adequate especially in light of Commission studies that repeatedly show average loading and unloading times to be far less than these allowances. In support of its position it offers a table showing man-minutes per ton at stops in the MAC region for 1967 and 1970 based on statistics taken from the Commission's Highway Form A and in a second table compares the free time used in the respective years with the free time proposed in the rule. MAC argues that free time should not be extended to accommodate inefficient shippers who transport large numbers of small packages. Furthermore, it states that extension beyond a 6-hour

period would require overtime pay for the driver and additional expenses to accommodate inefficiency while necessitating compensating rate adjustments. The conference opposes averaging concepts for detention free time contending that maximum permissible free time would become the average free time with carrier operations deteriorating accordingly. It doubts that present tariff rules authorize Ford's particular receiving procedure and opposes any distortion of appendix B that is intended to meet the special receiving practices of certain receivers. With regard to the Department of Defense's request for 14 days of free time, MAC contends that the request lacks merit and that if specific traffic causes the carrier to incur substantial additional expense then it should be subject to reasonable additional charges. MAC agrees with The Port Authority of New York concluding that the proposed detention rule should not be applicable on shipments from and to the port to the extent such shipments are subject to the detention rule prescribed by the Federal Maritime Commission. MAC advocates strict enforcement to make the rules effective.

III. Shippers:

1. *Grain Processing Corporation.*—GPC supports the uniform nationwide detention rule including mandatory prearranged scheduling for volume, truckload, LTL, and AQ shipments as a giant stride towards orderly equipment utilization. It regards the intentional or unintentional opportunity for discrimination among small and large shippers to be too omnipresent to permit scheduling devoid of tariff publication and ancillary rules and provision. GPC urges uniform nationwide charges at a level similar to any other type of detention.

2. *Swift & Company and Derby Foods, Inc.*.—Swift and Derby maintain that the slaughtering industry is highly specialized in the equipment needed, the strict scheduling required, and the handling employed. They, therefore, submit that perishable food motor common carriers should be exempted from the proposed rule. In the alternative, they contend that section 1(e) of the proposed appendix A be deleted because it conflicts with section 7 of the Uniform Bill of Lading contract, that section 2 of the proposed appendix A be altered to provide that where a delayed vehicle is not available for loading or unloading within 2 hours of the start of a shipper's normal day, time begin to run at the start of the next business day and that free time be more graduated extending from 120 to 420 minutes. They request that the proposed appendix B be eliminated or in the alternative, that section 6 of appendix B be deleted since spotting temperature-controlled trailers is of substantial benefit to the carriers and shipping public. Lastly, Swift and Derby submit that voluntary prearranged scheduling is lawful and beneficial while not subjecting the carrier to liability for failure to meet its schedule. They contend that flexibility is needed, and in particular that the use of brokers and the variations in the times shipments are loaded at outside warehouses virtually preclude the establishment of prearranged schedules.

In their reply statement Swift and Derby, in addition to reiterating their opinion in several areas, concur in the necessity of defining key words and phrases. They contend that the Bureau of Enforcement's proposal for handling delayed shipments is unrealistic since under these circumstances a shipment may not be prepared to unload but free time would begin to run after 30 minutes. With regard to spotting they request that the practice be defined and distinguished from dropping trailers on shippers' premises.

3. *The Grand Union Company.*—Grand Union opposes the establishment of an LTL detention rule on several bases. They submit that the nature of LTL traffic dictates longer and more costly handling time specifically with regard to verification of

shipments against the bill of lading and the sorting of cartons, that LTL rates already are proportionately higher to reflect higher costs, that the proposed time allotments are insufficient, and that the practice of aggregating weights to obtain a free time on multiple shipments is inherently unreasonable. With respect to the proposed truckload detention rule, Grand Union notes that the rule fails to provide adequate free time for shipments above 36,000 pounds and to account for numerous driver coffee breaks. They contend that shippers are not responsible for much of the detention that occurs, that it is the carrier's responsibility to police its help and deliver freight expeditiously if they are to collect detention charges.

In its reply statement, Grand Union reiterates its views in several areas and disputes allegations that it does not honor its detention bills. According to Grand Union each bill is handled on an individual basis and paid if it is determined to be legitimate in the sense that it did not result from a carrier mix-up, poor performance of the driver, or a palletized shipment that was confused or loaded to the carrier's own convenience and specifications. Subject to the above qualifications Grand Union declares itself receptive to a uniform nationwide detention rule.

4. *Certain-Teed Products Corporation.*—CPC supports a uniform nationwide detention rule along the lines of the rail demurrage tariff in order to eliminate opportunities for illegal discrimination, preference, prejudice, concessions, or rebates and to effect maximum utilization of automated systems techniques. It supports mandatory prearranged scheduling of truckload, volume, and AQ shipments exceeding 250 pieces or 5,000 pounds for the mutual benefits of reduced waiting time and dock congestion. CPC supports Commission prescription of detention charges at a level that will act as a deterrent without being income producing.

5. *Morton Salt Company.*—Morton supports in principle the positions of the Salt Institute and expands upon the rationale supporting its position. It contends that the tank truck exclusion should be broadened to include commodities in bulk without regard to the specific manner of transportation since liquid and dry bulk commodities bear no transportation relationship to packaged goods. It observes that salt haulers form a specialized pool of irregular-route common and contract carriers, are predominantly individual operators and publish their own custom-made rules in consultation with the relatively few shippers in the industry. Morton opposes a uniform nationwide rule, and if it is prescribed requests an exclusion based on the rigidity and inflexibility that would be saddled upon the industry. Morton urges that charges be determined on a territorial or regional basis, and opposes mandatory prearranged scheduling contending that scheduling is already commonly practiced, mutually beneficial, and nondiscriminatory. Morton strongly urges that a detention rule place responsibility for the payment of charges on the party responsible for the delay.

6. *ITT Continental Baking Company, Inc.*—Continental states its agreement with both the concept of a uniform detention rule and charge along the lines of demurrage and with the contentions in *Detention of Motor Vehicles—Middle Atl. & New England*, 325 I.C.C. 336 (1965). It requests protection from detention caused by drivers taking excessive time to back trailers up, drivers taking numerous coffee breaks, or drivers delying the unloading until additional help arrives. It requests specific restrictions concerning the type of delivery equipment used for LTL deliveries to enable it to unload within free-time limits. Continental supports both mandatory prearranged scheduling for truckload shipments exceeding 250 pieces or 5,000 pounds provided the shipper is made responsible for adhering to preset schedules and payment of charges by the party responsible for the delay.

7. *Westinghouse Electric Corporation.*—Westinghouse acknowledges the advantages of simplicity and standarization to be derived from a uniform nationwide rule but questions its feasibility in view of existing area-wide differences. It contends that free time should not be based on weight alone, and proposes a formula or table based on classification. It endorses free time based on 15-minute segments contending that 60-minute segments would unduly penalize and lengthen detention. Westinghouse opposes LTL detention charges contending that the long handling time required is often beyond the control of the parties, and proposes an incentive system of credits and debits as in rail to stimulate more expeditious loading and unloading. It concludes that the voluntary system of prearranged scheduling is lawful and mutually advantageous, but urges that provisions relating to mandatory prearranged scheduling deny carriers the ability to unilaterally decide whether or not to grant the service, establish reasonable rules, and disallow charges. It expresses doubt that LTL shipments can be efficiently prearranged because of the numerous variations in handling.

8. *General Mills, Inc.*—GMI supports a uniform nationwide detention rule and charge (1) as a means toward tariff simplification and uniformity, (2) to effect maximum utilization of automated systems techniques in the publication, policing, and application of detention rules and charges, (3) to prevent ambiguity and misunderstanding, (4) to avoid what appears to be the unreasonable practice—the publication of numerous different, unclear and inefficient detention rules in different areas or even within the same area, and (5) for more economical and efficient transportation service. GMI concludes that voluntary prearranged scheduling which is not an expedited or special service does not require tariff publication. If the Commission finds tariff authorization necessary GMI states that it will support tariff provisions authorizing mandatory prearranged scheduling for loads exceeding 10,000 pounds, provided that the rule is a flexible general-concept rule omitting the actual mechanics. It avers that such a rule would enable the more prompt and efficient handling of equipment with maximum utilization, the reduction of warehousing and inventory costs and greater productivity without discrimination. With respect to charges, GMI supports a charge that will both penalize for detention and remunerate the carrier for equipment use, place the charges on the responsible party, and be charged for and collected when they occur with strict follow up compliance surveys.

9. *Reynolds Metals Company.*—Reynolds favors the establishment of a uniform nationwide detention rule. It opposes mandatory prearranged scheduling contending that the motor carrier's flexibility and ability to provide tailored service may be placed in a straitjacket to the detriment of all. It avers that at any one time a shipper may lack sufficient freight to ship or a carrier may be short of equipment while being obligated under its schedule, and that the act already provides sufficient safeguards against unlawful practices. Reynolds supports the allocation of free time by weight, and advocates the selection of several detention charges in order to give recognition to the carrier's cost for different types of equipment.

10. *Coca-Cola Company.*—Coca-Cola firmly supports the concept of a nationwide uniform detention rule and charge for volume, truckload, LTL, and AQ rates. It urges that the truckload and volume rule provide that charges be paid by the party responsible for the delay irrespective of whether line-haul charges are prepaid or collect and that it be incumbent upon the common carrier to assess and collect the charge. In the event that charges are incurred by a person not party to the bill of lading contract, charges should be assessed against the shipment. Coca-Cola supports

mandatory prearranged scheduling provisions or truckload shipments only and provisions relating to spotting of trailers for the greater flexibility spotting provides and the freeing of carrier's driver and power unit faster. It urges Commission enforcement of the applicable rules.

11. *United Brands Company.*—UBC takes the position that uniform nationwide detention rules would serve a useful purpose in promoting efficient use of carrier equipment provided charges are assessed only against parties to the motor transportation contract. It interprets the proposed rule to confirm this view, and requests that it be further clarified.

12. *Ford Motor Company.*—Citing *Detention of Motor Vehicles—Middle Atl. & New England, supra,* Ford submits that a strong need exists for a single, clear, and fair set of nationwide rules to govern detention of motor vehicles, and suggest that exclusions apply to the vehicle transporting exempted articles rather than the carrier.

In its section-by-section analysis of the proposed appendix A, Ford recommends that for preciseness and clarity the title be changed to "Rules Governing Detention of Vehicles with Power," and that it be made applicable to any shipment or group of shipments aggregating 12,000 pounds or more tendered or delivered simultaneously in the same vehicle since to apply different detention rules to identical detention conditions would be discriminatory and prejudicial per se. It suggests clarification and expansion of section 1(d) to provide that charges be prorated upon the aggregate weight of individual shipments when such is the case in order to protect all parties when the party responsible for the delay is not a party to the transportation contract. It suggests that section 2(a) require notification of arrival in writing or orally if confirmed in writing for free time to run, and that time run only during the normal business hours of the business. With regard to prearranged scheduling, Ford supports the language in the section contending that informal scheduling may be beneficial. It maintains that specific tariff publication is not required for specific prearranged schedules to be lawful since they are not discriminatory per se, observes that adequate relief exists under the act, and that requiring prior tariff publication for each individual prearranged schedule would impose an unwarranted administrative burden and straitjacket on all parties. It recommends the addition to section 3 of language to govern the conversion of a vehicle with power to a vehicle without power, and finds the free-time allowances adequate and in accord with industry practice. It does not object to a reasonable prescribed charge in 15-minute segments provided it is related to carrier costs, imposes no greater penalty than necessary for deterrence, and is graduated so as to penalize excessive detention rather than the isolated instances where carrier equipment is delayed. With section 5, Ford requests that the required record be written, and that with note A, there be a clarification to assure that the proposed appendix A rules apply only to vehicles with power units.

In its analysis of the proposed appendix B Ford recommends that the title be changed to "Detention of Vehicles Without Power Units," and that it apply to any shipment or group of shipments aggregating 12,000 pounds or more tendered or delivered simultaneously in the same vehicle. Ford fears that appendix B may be construed to deprive shippers of their line-haul right to have loaded or unloaded trailers placed at platforms whenever they have been temporarily held in the shipper's holding yard awaiting instructions for placement. Placement is performed by the carrier individually, by arrangement with an exclusive agent, or by a common agent of two or more carriers. But, if it is interpreted that free time commences under appendix B when the trailer is left in the shipper's holding yard, Ford claims that such interpretation will be contrary to precedent and warns that as a matter of economics it

will drive much traffic to alternative forms of carriage, force a return to the practice of detaining carrier's vehicles in the unloading area, or require carriers to temporarily hold vehicles on their own premises awaiting placement instructions. Ford contends that the holding yard concept with free time running for the duration of the time trailers are at the platforms has proved mutually beneficial, and has significantly reduced detention of trailers and power units. It, therefore, requests appendix B be clarified or interpreted to hold that the temporary use of a holding yard on a shipper's premises does not break the traditional continuity of the carrier's line-haul obligation to place trailers at shipper's platforms. In support of its position, Ford cites several of the Commission's rail cases concerning the rail line-haul obligation. Ford proposes that the preamble and section 1 be replaced with a general provisions section and a definitions section, that these new sections be consistent with the economically vital holding yard procedure and be modeled after the language used in most carrier bureau tariffs. Under this approach the rule will neither enlarge nor restrict carrier's line-haul services and obligations. In addition it requests simplification of the section governing the commencement of free time. It proposes that section 3 exclude Saturdays as well as Sundays from free-time computation, clarify how free and chargeable detention time will be computed in terms of standard definitions of loading and unloading and be consistent with holding yard procedures. It proposes that section 4 assess a lower charge for the first day of detention with a gradulated scale for penalizing those who use trailers as warehouse space. Ford also proposes the elimination of sections 5 and 6 contending that neither section is appropriate in a detention rule, and in their place proposes the addition of a recordkeeping section.

Ford questions the practicality and enforceability of uniform LTL and AQ rules in light of the fact that unloading such shipments has traditionally been the duty of carrier's employees and that detention is assessed against the party causing the delay. In analyzing proposed appendix C, it suggests that section 1(a) be expanded to define what type of delay is attributable to whom in order to protect shippers from delays over which they have no control, and that section 1(a) limit application to shipments in multiple tender for loadings or unloadings that aggregate in excess of 12,000 pounds. Ford proposes deletion of section 2 contending that carrier's employee cannot be sufficiently impartial to warrant being the final arbiter, and suggests that the proposed free time is both impractical and unattainable, and in effect a charge for unloading service which carriers have traditionally included in line-haul rates. As an alternative it proposes basing free time on observations at particular types of industries or on a survey of actual times at a cross-section of locations around the country.

13. *The Nestle Co., Inc.*—Nestle urges that shippers be held responsible only for detention caused at their plants or warehouses and not be penalized for delay incurred at public warehouses, consignees, or other destinations over which they have no control.

14. *The Great Atlantic & Pacific Tea Company, Inc.*—A&P agrees that a need exists for a uniform nationwide detention rule for truckload and volume rates when the driver remains with the equipment. It maintains that prearranged scheduling for truckload and volume rates is of primary importance, and has become commonplace because of its mutual benefits. It submits that the service should be mandatory and published in lawfully filed tariffs in order to prevent discrimination. A&P opposes an LTL and AQ detention rule contending that the LTL rates already cover the higher pickup and delivery costs, the carrier already benefits by combining several LTL shipments for one delivery and there is no timesavings. It cannot comprehend how

carriers can logically be expected to schedule delivery of several shipments on the same vehicle. A&P opposes the inclusion of charges and instead advocates separately prescribed nonpunitive charges for each carrier and/or area based upon the carrier's cost of owning the equipment, plus driver's wages when the driver remains with the equipment. It submits that the driver must be physically capable of loading or unloading the shipment within the allocated free time, and that free-time brackets should be established for over 36,000 pounds and be in greater time increments to account for decreasing productivity from fatigue.

In its reply statement A&P reiterates several of its positions. It observes that free-time allowances have not kept pace with the trend toward longer trailers and heavier loads. It submits that if the Commission decides to have the charge reflect a penalty, then the charge should have two parts: one being the justifiable costs to each individual carrier, and the other being a penalty applying equally to all carriers. A&P requests that carriers be left free to schedule and make pickups and deliveries around the clock by mutual consent of shippers in order to relieve daytime congestion and reduce costs, and it opposes the assessment of detention against shippers where free time has been exceeded if the consignee has not contributed to the cause of the delay.

15. *Acme Markets, Inc.*—Acme feels a strong need for a single, clearly written, fair set of nationwide detention rules. With regard to the proposed appendix A it requests that detention not be assessed when delay is attributable to the carrier's performance, and that section 1(e) be deleted since it provides the carrier with the ability to "pawn off" its inefficient labor. It requests that carrier preparation time be more clearly defined to ensure its exclusion from free time, and that free prearranged scheduling be recognized as absolutely essential to the rule, observing that in the years the Middle Atlantic rule has been in effect it has been substantiallly successful and workable. Acme criticizes the absence of any requirements forcing carriers to make themselves available to deliver within shipper's normal business hours, and complains of carriers charging either redelivery and storage charges when free time has not expired at the end of carrier's normal business day or the steeply graded after-hours delivery charge if work is continued. Acme contends that the free times do not reflect the increased size and volume of trailers that carry over 36,000 pounds nor the fatigue factor beyond that weight, and that charges should be cost justified and allowed to vary by region. With regard to the proposed appendix C, Acme opposes a uniform LTL and AQ rule contending that since the driver is not responsible to the shipper such a rule would be difficult if not impossible to enforce and would not benefit the parties. It would support prearranged scheduling for shipments exceeding 8,000 pounds but opposes the practice of aggregating if a carrier accumulates LTL shipments to the extent that it violates its duty to deliver with "reasonable dispatch," and then causes detention as a result of a lengthy sorting. Acme, therefore, proposes that a limit of 12,000 pounds be placed on aggregating and above that the truckload detention rule apply plus an additional 5 minutes per shipment.

In its reply statement Acme supports the proposed rule subject to its initial criticism and questions how others can support uniform terminal service rules with their emphasis on nationwide uniformity while opposing the proposed rule. It refuses to supervise carrier employees or pay detention caused by poor performing carrier employees, and opposes any reduction in free time charging that it is an attempt to reduce carrier responsibility for loading and unloading. Acme questions how prearranged scheduling can be repugnant to those who freely admit to voluntarily coordinating schedules, and contends that mandatory prearranged scheduling is necessary to avoid chaos.

16. *Purex Corporation.*—Purex finds a need for uniform nationwide rules governing the assessment and collection of detention, and mandatory prearranged scheduling of truckload and volume shipments and shipments exceeding 10,000 pounds. It believes that voluntary scheduling is within the normal range of carrier service and is, therefore, lawful, but that if prescribed carrier flexibility should be preserved. It opposes the prescription of a uniform nationwide charge for the same reason that other carrier services are not uniform nationally. Purex requests that the rule assess charges upon the party on whose premises detention occurs, that free time for multiple LTL shipments be at least equal to truckload free time for an equal weight in view of the greater paperwork, the greater loading and unloading time and the relatively higher LTL rates, and that the concepts of "normal business day" and "business hours of consignor and consignee" be clarified in light of the severe and unfortunate pickup and delivery limitations being imposed by some shippers. Purex states its preference for a detention charge based on 30-minute increments, and recommends the development of an incentive system to encourage the early release of equipment contending that incentives are more productive than penalties.

17. *Geo. A. Hormel & Co., Oscar Mayer & Co., John Morrell & Co., and The Rath Packing Company.*—These shippers request the deletion of section 6 of the proposed appendix B contending that the spotting of trailers equipped with temperature control independent of the power unit is a common practice of immense benefit to both carrier and shipper whereas the section as written seems to encourage the spotting of refrigerated trailers for freight that does not require refrigeration, a senseless result.

18. *Texaco Inc.*—Texaco commends the Commission's effort to establish uniform rates and rules relative to detention of motor vehicles, but requests that special recognition be given to the different problems of coordination and equipment availability faced by industrial plants that are older or more complex in order that they not be penalized. It, therefore, suggests that free time not start until the vehicle is placed or spotted at shippers' platforms. Texaco suggests that density is a controlling factor in the assessment of charges and should be given recognition in free time, and that since shippers are subject to penalties for detention of motor equipment, carriers failing to meet their prearranged schedules should be subject to penalties also because their failure can result in expensive delays for shippers.

IV. Shipping associations:

1. *Salt Institute.*—Salt Institute opposes a uniform nationwide detention rule and charge contending that the prevailing rules and charges have been formulated to take into account their geographical territory with its peculiarities and dissimilar economic conditions, and that this would be impossible in a nationwide rule. It opposes the publication of provisions regulating prearranged scheduling since the present practice has proven beneficial in providing flexibility without demands being made on any party. The Institute simply urges the adoption of a rule allowing the carrier to assess detention charges on the party responsible for the delay.

2. *American Retail Federation.*—The Federation opposes a uniform nationwide detention rule contending that it will not bring about maximum utilization of carrier equipment nor prevent unreasonable practices, unjust discrimination, undue preference or prejudice, the existence of which it had no knowledge. It states its preference for voluntary schedule coordination between carrier and shipper maintaining that such arrangements are not unduly prejudicial to the small shipper who has no need for regular schedules and will lead to the most efficient use of equipment. It contends that the differences between carrier and shipper would only be

aggravated by nationwide rules while delivery efficiencies can best be obtained by voluntary cooperation rather than nationwide rules.

In its reply statement the Federation observed that the 239 complaints received by the Bureau of Enforcement in the 1971-72 fiscal year were relatively small in number especially since 190 relate to scheduling and not detention problems. It nevertheless detected a consistent pattern of recommendations for uniform Commission rules and in recognition thereof no longer objects to a uniform truckload and volume rule for detention of vehicles with power units provided the charges and time limits are permitted to vary by area costs, operating conditions, nature and form of articles transported, type of service and other pertinent characteristics. The Federation concurs in the need for tariff authorization of prearranged schedules for shipments in excess of 10,000 pounds provided there be no requirement to publish their details even though it does not consider part II of the act to be violated where tariff authorization does not exist. It supports the assessment of charges on the party responsible for the delay and the development of positive incentives in the form of credits.

3. *Beaumont Chamber of Commerce.*—Beaumont strongly opposes uniform detention rules for LTL and AQ shipments since the parties have little or no control over carriers' employees or arrival times. With regard to truckload and volume shipments it believes that equity can only be achieved through regional rules especially with respect to charges. It supports uniform regional rules applicable within a region irrespective of the origin or destination of the shipment in order to account for the differing economic and geographic considerations that exist throughout the Nation. Beaumont opposes mandatory prearranged scheduling contending that the present flexible system has proved beneficial to all, and is now unlawful per se. It suggests that if the Commission finds tariff authorization necessary, the rules be published as "carrier convenience rules" but it doubts that illegal activities will be prevented by such publication especially since the Commission already has the power to curb such practices. Beaumont attached a proposal model rule for the southwestern territory.

4. *Grocery Manufacturers of America, Inc.*—GMA supports the concept of a prescribed nationwide motor carrier detention rule with prearranged scheduling, and urges that it fix liability for payment on the party responsible for the delay.

5. *Motor Vehicle Manufacturers Association of the United States, Inc.*—MVMA believes a uniform nationwide truckload and volume detention rule will be advantageous to shippers and carriers and advocates its adoption by intrastate motor carrier bureaus as well. It avers that an LTL or AQ rule would be impractical and result in a multitude of enforcement problems, unreasonable administrative expenses and the imposition of unwarranted penalties against shippers. MVMA considers voluntary prearranged scheduling without a tariff authorization a normal and otherwise lawful business practice under the act and opposes making it mandatory. It contends that the cost and penalty elements of detention should be cost justified and uniformly applied, while strike detention should also be uniformly applied but only consist of a cost element. It proposes that appendix A provide for the application of charges when a vehicle with power is subsequently changed to a vehicle without power, appendix B, section 1(b) be reworded to clarify when the carrier's responsibility for shipments terminates, Saturdays be excluded from time computations for vehicles without power, and appendix B contain a recordkeeping section.

6. *Canned Goods Shippers Conference.*—The conference favors both a uniform truckload and volume detention rule and a uniform detention rule covering the spotting of trailers for loading or unloading that allow for departures required by local, area, or territorial considerations. It believes a uniform LTL and AQ detention rule is impractical and unworkable particularly the provisions in section 2(a) pertaining to prearranged scheduling. The conference majority believes that tariff provisions authorizing prearranged scheduling are unnecessary since the practice is mutually beneficial and has become a part of the normal relationship between carrier and shipper without prior authorization in most major motor bureau tariffs. It opposes any charge for prearranged scheduling, and contends that detention charges should simply be compensatory considering only direct labor and equipment with future adjustments remaining cost justified. It suggests that detention charges should not and need not be the same at a particular point for all bureaus or carriers, that if uniformity is established it should not be set at the highest level in effect at the time, and that the charges be assessed against the responsible party. With regard to appendix B the conference recommends that detention specifically be assessed on the responsible party, as worded in appendix C, that written confirmation of verbal instructions be omitted since the practice is neither necessary nor practical and is not currently required in the detention rules of most of the major motor carrier tariff publishing bureaus, that section 3(c) pertaining to prearranged scheduling be omitted, and that section 6 be omitted since the practice is not restricted in the spotting rules of the major motor carrier rate publishing bureaus.

7. *National Retail Merchants Association.*—NRMA states that notwithstanding the fact that its members approximate 2,000 and represent some 26,000 retail department and specialty store outlets throughout the United States it is unaware of any carrier or shipper discontent regarding the absence of a uniform detention rule and would expect that if discontent did exist it would have come to its attention. It doubts the practicality of such a rule especially in view of the country's diverse geographical transportation territories, and believes that the present flexible system of carrier-shipper arrangements is the most efficient.

8. *Texas Industrial Traffic League.*—The league supports the basic concept and structure of the proposed detention rule for volume and truckload shipments but proposes that consideration of rates for LTL and AQ shipments be delayed in view of the fact that smaller shipments involve the efficiency of carrier employees vis-a-vis (1) preparing a vehicle for loading or unloading, (2) meal periods and conflicts thereof, (3) coffee breaks and other breaks, (4) checking and securing exceptions on the delivery receipts, and (5) the expense of keeping accurate records for all shipments. It proposes that free time be stated as "120 minutes per vehicle, plus 30 minutes for each 5,000 pounds, or fraction thereof, loaded or unloaded" and that the Middlewest Motor Freight Bureau Tariff be considered for nationwide promulgation. It states that no detention charge has heretofore been cost justified and suggests that a charge of this nature merits one.

9. *Drug and Toilet Preparation Traffic Conference, Eastern Industrial Traffic League, Inc., and The National Small Shipments Traffic Conference, Inc.*—These shipper groups state that they have operated under the prescribed Middle Atlantic rule since 1965 and as a result strongly support prescription of the same truckload detention rule and charge on a nationwide basis. They accept the language in the Commission's Notice of Proposed Rulemaking as their own reasons for supporting a uniform nationwide truckload and volume detention rule, and in addition refer to

prevailing chaotic conditions and serious anomalies as illustrated in New York City where five different detention rules and charges exist to cover identical circumstances. These shipper groups maintain that there is an urgent need for prearranged scheduling as part of a truckload or volume rule, and support the proposed provisions since they are the same as in the Middle Atlantic rule, and have thus proven themselves to be reasonable, practical, and invaluable to carriers and shippers alike for more timely, expeditious and efficient pickups and deliveries. They request a uniform nationwide cost-justified exact charge to protect shippers and maintain uniformity. They list the factors that should and should not be considered in establishing such a charge, and oppose the imposition of a penalty element contending that any charge is penalty enough and that a high charge could be self-defeating by making detention profitable for carriers. In addition they find a penalty element inappropriate since the carrier sets the pace and effects the delay. These shipper groups assert that the rule should assess charges against the responsible party and against the shipment if the responsible party is not a party to the bill of lading contract. They conceptually oppose an LTL detention rule contending that detention costs are already included into the disproportionately higher LTL rates, thus the net effect of the rule would simply be an LTL rate increase, that the allocation of detention time and charges among numerous shippers cannot be equitable, and that substantially increased costs would be required to keep LTL records. Specifically noted is the proposed rule's failure to differentiate when the power unit is not detained, the absence of provisions excluding delays caused by carrier failure, the unfortunate limitation of prearranged scheduling to shipments or aggregations of 10,000 pounds or more, the unfairness resulting from allocating charges by aggregating weights when some shipments in actuality cause no detention, the fact that more free time is offered for each shipment individually than for multiple tenders, the proportionately less free time per weight accorded LTL shipments in comparison to truckload shipments, the unlimited carrier discretion in assessing charges where the remainder of an undelivered shipment is placed in storage and subsequently redelivered, the lower cost of LTL detention because LTL shipments are transported in smaller vehicles, the absence of a recordkeeping section and the carrier's ability to continue with other deliveries and subsequently return to deliver an LTL shipment after congestion has subsided. These carrier groups acknowledge the need for prescheduling larger LTL and AQ deliveries and suggest that it be done in rules concerning "Notification Prior to Delivery."

In their reply statement, these carrier groups reiterate many of their positions. In addition they endorse Ford Motor Company's rationale and rewording of appendix B intended to ensure continued economic feasibility of temporary holding yards prior to spotting trailers, and support the deletion of section 6 of appendix B. They contend that carrier objections to uniformity based on variances in each territory are timeworn, bare of specificity, and incapable of justifying severe differences such as those maintained today; and furthermore, they argue that the movement toward uniform terminal service rules including rules for vehicle detention is inconsistent with carrier opposition to the proposed uniform nationwide detention rule. They suggest that many parties opposed the prearranged scheduling provision on the mistaken belief that if published it would become mandatory when in fact the decision to preschedule is optional with the shipper. On the issue of charges, they contend that since detention rules and charges bear no relation to the rate structure they can be uniform and cost based, especially since there are only two meaningful cost factors, (1) drivers' wages and (2) average depreciation cost of carrier equipment, and both are

similar nationwide. They propose that the Middle Atlantic charge be prescribed nationwide, with respondents having the right to reopen the proceeding if a higher charge can be cost-justified, and that the first hour of detention also be divided into 15-minute segments. These shipper groups oppose any change in the responsibility-for-delay condition contending that detention should apply only when the delay is attributable to the shippers otherwise it is too easy for the carrier to thrust upon the shipper the burden for all delays. They propose the cancellation of all consideration for transportation by pallets in return for the establishment of a pallet incentive system to pay back allowances at the same level as detention charges for loading or unloading pallets in less than the authorized free time. They support the exemption sought by The Port of Authority of New York and New Jersey.

10. *National-American Wholesale Grocers' Association.*—NAWGA contends that detention can be chargeable to shippers only when the delay is attributable to them or others designated by them. It proposes an exception to free-time computation be made to provide for those times when shippers' carefully spaced schedules are destroyed by carriers arriving on different dates without notification—allowing free time begin to run from the actual time unloading commences. It proposes the insertion of a paragraph to provide extra free time, as certified by the driver, for those loads whose nature, cube of the individual units, manner of unloading, condition of the items being unloaded, or conditions governed by Government regulation make the ordinary free time unreasonable. NAWGA contends that the carrier should have the option to load or unload a spotted trailer upon agreement with shipper; that if mail is an acceptable means of notification then a shipper not be held liable for detention after the letter has been postmarked, that limiting prearranged scheduling to LTL loads exceeding 10,000 pounds discriminates against the carrier delivering multistop loads and works a hardship on shippers who face situations of simultaneous unscheduled arrival of carriers, and that computation of free time on the aggregate weight of multiple shipments is unfair because weight is the only reference for free time and because the tariffs covering unloading costs of the individual shipments are computed individually, not in the aggregate.

11. *National Industrial Traffic League.*—NITL favors the establishment of a uniform nationwide truckload and volume detention rule, and recommends that it be pursued promptly and without delay. It considers appendix A a suitable basis for a nationally prescribed rule with minor exceptions. It suggests that the rule be clarified to place liability for detention on the party causing the delay. The League suggests that the time for cost-justified charges has arrived, and notes the equitability of a national prescribed charge based on proven costs and rounded to the next whole dollar as the penalty element. It contends that voluntary prearranged scheduling without tariff authorization should be permitted and encouraged, but that if as a matter of law the Commission concludes that tariff authorization is required, states its satisfaction with the language in proposed appendix A. NITL proposes rewording free time to provide 20 minutes per ton of freight loaded or unloaded at origin, destination or stopoff point with a minimum allowance of 90 minutes per vehicle stop, contending that this formulation is simpler, better adapted to computerization, and provides an automatic response to innovation in transportation technology by recognizing and adjusting to growth in vehicle capacities. Concerning appendix B, NITL considers the language to be well chosen and clear with a few areas needing clarification. It observes the advantages of a cooperative arrangement whereby carriers may store trailers in shipper yards for future use and suggests a definition for constructive placement to

remove any doubts as to the propriety of the practice. It proposes the deletion of section 6 finding it contradictory in purposes and redundant.

In its reply, NITL reiterates many of its positions. It suggests additional time and effort be devoted to working out pragmatic rules on LTL and AQ shipments. It contends that sufficient data has not been developed to justify, at this time, a uniform level of charges. Instead, it advocates a cost-justified charge allowing recovery for labor and equipment directly resulting from detention. With regard to prearranged scheduling, it urges the Commission to declare voluntary prearranged schedules without tariff authorization lawful and not require the rigid publication of either the schedules or methodology.

12. *Asphalt Roofing Manufacturers Association.*—ARMA favors a uniform nationwide detention rule on volume and truckload shipments citing such advantages as the elimination of confusion resulting from a multiplicity of tariff rules, substantial efficiencies in simplifying carrier operations and shipper audit of freight charges, and the ability to plan transportation costs more accurately and incorporate them into the shipper's price structure. It supports publication of prearranged scheduling rules for truckload and volume shipments contending that they are highly desirable to an industry relying on spotting of trailers by irregular-route carriers, and their publication will minimize the potential for discrimination or prejudice against individual shippers. It suggests that if prescribed and published in tariff form all legal problems relating to the lawfulness of prearranged scheduling would be eliminated. On the issue of charges ARMA suggests that charges be based upon costs to carrier of vehicle and drivers or just vehicle if detention result from spotting since penalties may defeat the purposes of detention and that an incentive for early release of carrier equipment be developed. In commenting on proposed appendix B, ARMA supports 24 hours of free time but urges that computation of detention start at 8 a.m. on the day following the spotting of the trailer. It urges that Saturdays also be excluded from computation of detention since if plants even operate it is not on a normal schedule while detention charges would be almost inevitable for trailers spotted late Friday afternoon at a plant closed on Saturday. It requests that the rule specifically prohibit the assessment of charges for entering into prearranged schedules since they are mutually beneficial, and that section 5 be expressly limited to situations caused by the act or default of the shipper. ARMA announces its agreement with all sections of the rule subject to the above modifications.

13. *National Association of Food Chains.*—NAFC supports the promulgation of a uniform nationwide truckload detention rule contending that simplification and codification will serve to ease the administrative burden on all and assure that all lawful requirements are met. It believes that the rule should be framed in such a way as to accommodate differences between geographical regions, and that the rule not prescribe a uniform charge but rather the ground rules for regionally developed charges. It urges tariff provisions for prearranged scheduling in order that the rule be effective and contribute to the preservation of a semblance of order in potentially chaotic situations, and that the rule reflect shipper's ability to arrange for a reasonable arrival schedule. NAFC urges the Commission to undertake a study aimed at the development of a formula to base free time on a combination of shipment weight and the number of packages as a more equitable and meaningful basis for free time, and that the rule reflect reasonable free times for loads exceeding 36,000 pounds since the trend is toward heavier loading. It opposes promulgation of an LTL or AQ rule contending that the situation is entirely different: time is more a function of factors within the carrier's control (*e.g.*, method of carrier loading, propensity for not keeping

entire shipments together, and additional carrier handling increasing the possibility of missing pieces and more burdensome checking on delivery), LTL shipments naturally require greater proportionate time considerations and paperwork and the quantity of paperwork will create an administrative nightmare in an industry already inundated with enormous paperwork requirements. If the rule is nevertheless promulgated, NAFC urges an increase in free time and the elimination of time computation by aggregating the weights on multiple shipments since the paperwork in such shipments will almost inevitably exceed the meager free time. It also urges prearranged scheduling because of the time-consuming characteristics of the shipments and suggests a cutoff of 5,000 pounds since a 10,000-pound limit does not offer much opportunity when truckload weight is 12,000 pounds.

An attached verified statement of the National Tea Company concurs in most portions taken by NAFC and in particular the need for additional free time for shipments in excess of 36,000 pounds. It observes that the proposed rule does not deal with partially palletized shipments nor the checking problems and delays caused when palletized truckload shipments have to be stripped down to make counting possible. It also suggests that carriers may hold up LTL shipments to effect multiple deliveries.

In its reply statement, NAFC reaffirms its former positions and observes that the record supports the promulgation of a uniform nationwide truckload detention rule although objections exist as to uniformly prescribed charges. It submits that the driver's detention report must not be construed as a final judgement as to responsibility for delay, and it advocates a balanced approach to detention in recognition of the dual nature of its cause. It avers that the rule will not solve all enforcement difficulties, but suggests that the problem will be mitigated by the replacement of the present multiplicity of rules with one commonly understood rule.

V. Governmental interests:

1. *Department of Defense.*—DOD in a series of six verified statements strongly supports prescription of a uniform nationwide detention rule. It concludes that the multitude of exceptions to basic detention rules furnish the means to manipulate individual carrier traffic service to particular revenue needs and are, therefore, alien to detention. It views uniformity as the way to efficiency in equipment utilization. DOD seeks an exception of up to 14 days from the normal free-time allotments for high explosives and ammunitions since the nature of these goods require that they be left undisturbed until the next handling is absolutely required. The safety factor rather than incidental savings in labor and storage facilities predominates in this request, which allegedly is supported by the carrier's obligation to allow reasonable time for loading and unloading within the line-haul rates. After 14 days of free time have expired, DOD requests that shipments of such goods not be charged with the penalty portion of the charge since under the circumstances of safety the trucks cannot be unloaded until such time as unloading is feasible. It suggests a reduced detention charge based upon daily per diem charges plus 20 percent for incidental expenses. DOD avers that voluntary prearranged scheduling through controlled operations has proven essential to efficient functioning and advantageous to the parties. Coordination between carrier and shipper is characterized as mutually beneficial since the industries are so intertwined, and prearranged scheduling conforms perfectly to the goals of detention. It advocates general tariff language similar or identical to that proposed to insure that the service is authoritatively available to the public without danger of discrimination or the managerial whim of particular carriers. DOD notes that a scheduling rule should be sufficiently general to accommodate the

multitude of varying operational situations. Consequently, a tariff provision simply requiring carriers to provide scheduled service is adequate and not contrary to rule 11(a) of Tariff Circular MF No. 3, particularly when it is remembered that from a practical and legal standpoint, a tariff rule governing voluntary prearranged scheduling is not necessary. In subsequent verified statements various DOD witnesses describe their voluntary scheduling and prelodge procedures at the major terminals of Bayonne, N.J., and Oakland, Calif., and the benefits derived therefrom. DOD advances no comments on the level of charge except to say that the cost evidence of record should enable a determination of what an average reasonable level should be.

2. *General Services Administration.*—GSA, representing the executive agencies of the U.S. Government excepting the Department of Defense, supports the proposed uniform nationwide vehicle detention rules including provisions for prearranged scheduling. They maintain that (1) uniformity will simplify carrier tariff provisions facilitating maximum utilization of automated systems techniques in the publication, application, and policing of detention rules and charges by carriers and shippers alike, (2) uniformity will encourage maintenance of efficient and economic service by carriers, and help assure uniformly reasonable charges for the detention of vehicles, and (3) uniformity should assure publication of prearranged schedules to be established for the pickup and delivery of shipments.

3. *Interstate Commerce Commission-Bureau of Enforcement.*—The Bureau submits its conclusions based upon a comparison and analysis of detention rules published by six of the major rate bureaus: CSA, CMB, ECA, MWB, RMB, and SMC, all of which were in effect as of August 31, 1973. It notes that these rules contain a plethora of specific exceptions to the general rule and classifies them by geography, restrictions on named commodities, or individual carrier exceptions. Elimination of these specialized exceptions through the establishment of a uniform detention rule, according to the Bureau, will allow the public to acquaint itself with applicable provisions and to understand the conditions under which shipments are tendered, loaded, and unloaded. Simplification will reduce the vast administrative expense and effort required by all parties because of the complexity and lack of uniformity in these rules. It will reduce paperwork and facilitate the application of automated systems techniques to the compilation, retrieval, and application of tariff provisions. The incentive for contriving complicated exception provisions to favor select shippers or commodities would be eliminated. The Bureau finds that with the exception of specific detention charges assessed and free times provided, there is little in the way of significant differences among the detention rules studied. While unsure of whether charges and free times can be standardize nationwide on all commodities, it finds a strong argument favoring implementation of such uniform detention rules in the successful example of the Middle Atlantic-New England area and nationwide handling of certain iron and steel products. Corroboration of widespread detention abuses as alleged by numerous complaints received from striking line-haul owner-operators engaged in the movement of iron and steel articles convinced the Bureau of the need for implementation of the proposed uniform nationwide detention rules as modified by Bureau suggestions. These abuses allegedly included (1) failure to prepare detention records, (2) failure to keep and maintain detention records, (3) failure to prepare and maintain detention records in the substance, form, or manner prescribed (including use of falsified records), and (4) granting and giving unlawful concessions to shippers. The Bureau notes that for fiscal 1971-72 a total of 221 complaints or inquiries were received and made mention of 239 conditions or situations relating to vehicle detention practices, with prearranged scheduling and the effects of

nonuniformity predominating. The Bureau summarizes a review by region of the results obtained and problems reported by field staff of the Bureau of Operations regarding the status of detention in their respective areas. In its analysis of the proposed appendix A, the truckload and volume detention rule, the Bureau suggests that enforcement would be facilitated if the rule defined its key words and phrases. It suggests defining or limiting vehicle preparation time since it has often been used to avoid assessment of charges, phrasing to prevent the imposition of additional duties and obligations upon vehicles and drivers through the manipulation of pickup and delivery procedures on shipper premises, specificity as to whether free time is calculated on a "vehicle" or "shipment" basis to account for shipments involving multiple shipments on one vehicle, and guidance as to what constitutes delay or detention attributable to consignor or consignee since in most cases of dispute the shipper prevails and charges are not assessed. The Bureau indicates its dissatisfaction with the term "reasonable prearranged schedule for arrival." While it states recognition of the need for flexibility, it fears that the language is conducive to discrimination, prejuidce, and preference in favor of particular shippers. It suggests reasonable and nondiscriminatory tariff provisions regulating prearranged scheduling arrangements. Otherwise, Bureau efforts directed at insuring equity and equality of treatment between customers will be undermined leaving major shippers free to demand tailored schedules unfettered by nondiscriminatory tariff rules. The Bureau contends that the proposed 30-minute leeway exception is conducive to collusion vis-a-vis the granting and receiving of unjust discriminations, preferences, and prejudices between carriers and shippers operating on prearranged schedules. It advocates an alternative provision giving the delayed carrier the option of either redelivering at a later time or of computing detention time at time of arrival subject to a 30 minute "grace period." Additional Bureau proposals include a recordkeeping requirement for all pickups and deliveries, and the rephrasing of section 1(e) in recognition of the substantial number of carriers who do not make use of the Uniform Bill of Lading. The Bureau questions the wisdom of including in the rule reference to section 7 of the Uniform Bill of Lading contending that it is one-sided and would do little to encourage efficiency or vehicle utilization. It notes past difficulties concerning variations in the normal business hours of carrier and shipper, uncertainty as to whose lunch break the rule takes into account, and the fact that most rate bureau rules employ 10,000-pound minimum weights thus increasing the number of shipments subject to truckload rules. With regard to the proposed appendix B, the Bureau recommends selective rephasing of two sections. It asserts that the rule fails to adequately specify the relationship between notification and the running of "free time" and "detention time" periods particularly with respect to the failure to follow up telephone calls with written confirmation, a time limit on the receipt of confirmations by mail, and false or mistaken notification subsequently discovered by the driver upon arrival. It suggests that through the arrival of carrier's driver long after the shipper's normal free time has elapsed the grace period of section 5 may be used collusively to wipe out charges for prior detention. Additionally, it suggests that section 7 include a provision excepting detentions caused by strike interference from the normally applicable charges and requiring notification to carriers of such inability to make the trailers available as a condition precedent to obtaining lower detention charges. With regard to the proposed LTL and AQ detention rule of appendix C, the Bureau suggests the wording for a preface containing a general statement of applicability and restates former criticisms also applicable to this rule. It suggests that free time contain a factor to take into consideration the number of shipments or

articles required to be loaded or unloaded, and that section 6 be rephrased to insure uniform observance of the rule when it conflicts with other tariffs lawfully in file with the Commission. In summary the Bureau supports the three parts of the proposed rule as modified by it contending that they are workable, enforceable, required by industry conditions, will encourage more efficient equipment utilization and will aid in the elimination of unlawful practices intentional or otherwise.

In its reply statement, the Bureau comments at length upon the contents of the responses. It supports exempting high value horses and dump trucks claiming that the rule in these instances would serve no useful purpose, but opposes further exemptions including DOD's request for 14 days of free time on the basis of it not being available to other haulers and receivers of explosive materials. It adheres to its position favoring uniform nationwide detention rules based upon (1) the alleged lamentable state of vehicle detention this proceeding was instituted to correct, (2) the wastes resulting from inefficient and unreasonable equipment usage practices, and (3) the ever present inducements to unlawful practices, including granting and receiving of concessions and rebates, practicing of discriminations and giving of preferences, violation of driver safety regulations and falsification of drivers' logs and detention records which have been further stimulated by the open ineffectiveness, complexity, and nonuniformity of existing detention rules. Accordingly, a nationwide rule is needed to eliminate the myriad of exception and exclusions, finally clarify the liability for charges issue, provide a basis for enforcement and uniform interpretation of provisions, establish reasonable uniform recordkeeping, inhibit unlawful practices, and attain equity and simplicity. The Bureau reiterates its support for prearranged scheduling pointing out that voluntary prescheduling arrangements are seldomly voluntary when induced by the economic pressures of major shippers customers, and that with tariff provisions all shippers will have the opportunity for appointment deliveries. It opposes prearranged scheduling provisions for LTL and AQ shipments of less than 10,000 pounds or those involving multiple tenders, stopoffs and deliveries deeming such impractical and imposing an undue burden on carriers. The Bureau concludes, based on past Commission precedent, that voluntary prearranged schedules without prior tariff authorization are unlawful and that the practice should be terminated. In its additional comments, the Bureau proposes that the FMC continue to promulgate the only detention provisions governing the Port of New York but that the proposed rule be made applicable to all other marine facilities. It opposes Ford's conception of spotting contending that the arrangement allows Ford the advantage of the more favorable spotting provisions instead of the more stringent detention rules and rates of proposed appendix A. It suggests that Ford and like consignees should pay for the significant equipment burden placed on carriers as a result of such special "appointment delivery" systems, and that consignees who intentionally delay placement for delivery should not derive the benefits of more permissive spotting detention provisions.

4. *Federal Maritime Commission.*—The FMC requests the Commission adopt a provision requiring motor carriers to seek payment for detention at marine terminal facilities from the operators of such facilities in order to subsequently proceed against the shipper for the remaining balance of any ICC charge. This will avoid double compensation and impose liability for payment on the party primarily responsible for causing detention.

VI. Other interests:

1. *The Port Authority of New York and New Jersey.*—The Port Authority expresses concern that the ICC and FMC not prescribe conflicting rules covering detention of

motor vehicles handling waterborne commerce at the Port of New York, since the FMC similarly instituted a rulemaking proceeding to determine whether its proposed truck detention rules are just and reasonable within the meaning of section 17 of the Shipping Act of 1916. The proposed FMC rules are the result of nearly 2 years of informal talks with several parties, and confer upon motor carriers the right to collect detention charges from terminal operators at marine facilities in the Port of New York. The Port Authority fears that if both rules require compensation for the same detention, the resulting double compensation forced upon shippers and terminal operators would result in unlawful and excessive charges consequently threatening the lawfulness of both rules. To avoid this possibility, the Port Authority proposes that this Commission refrain from imposing upon shippers liability for truck detention over which they have no control, and over which the marine terminal operator would be liable to the motor common carrier under the proposed FMC rules.

2. *International Association of Refrigerated Warehouses, Inc.*—The IARW believes all detention rules and regulations should be uniform and, therefore, supports the purpose of uniform nationwide detention rules and regulations. It proposes that the free time designated for truckload shipments include considerations of density as well as weight with the factor yielding the most free time predominating. It supports prearranged scheduling for vehicles with and without power but minus the 30 minutes leeway currently provided since warehouses must pay wages to the unloading crew for the 30 minutes the bay remains open. It proposes the assessment of penalties by 15-minute segments against late carriers, and that carriers be required to arrive 30 minutes prior to scheduled arrival, allowing for preliminary communications and steps preparatory to unloading, or lose their scheduled slot. It argues that carriers should be able to schedule their arrival times at warehouses more accurately considering the repetitious nature of the service. Adjustments in arrival time could be coordinated with the warehousemen to avoid late-arrival penalties. With regard to spotting referigerated trailers, the association argues that the practice is desirable and necessary. It does not exacerbate the equipment shortage since it does not require the use of a power unit, whereas the proposed rule seemingly encourages the use of refrigerated trailers for the transportation of freight that does not require temperature control. IARW requests the rule prevent the running of free time and detention charges during those hours that are part of the shipper's normal business day but not of the carriers'. The Association urges more comprehensive and explanatory subheadings vis-a-vis spotting, that free time for spotting commence at 8 a.m. in keeping with most normal work hours, and that Saturdays, Sundays, and holidays be excluded from time computation for trailers without power units. It contends that LTL free times for equal weights are less than truckload free times when in fact LTL takes longer to handle. It, therefore, proposes a trebling in the free-time allowances for LTL shipments and that free time not be computed from the aggregated weight but rather be computed on an individual shipment basis. IARW makes several proposals allegedly to bring more clarity, consistency, and uniformity to the rules, and additionally requests the omission of any reference to constructive notice. It proposes averaging free time on a 30-day basis, contending that giving credit for handling vehicles in less than the allocated free time will stimulate the more expeditious handling of shipments. Lastly, it opposes a uniform nationwide level of detention charges believing that charges should be pegged to a consideration of regional costs and problems and be subject to protest and proof of reasonableness.

In its reply statement IARW reaffirms its initial positions. It disputes the Bureaus accusations contending that public warehouse are not "culprits" in the area of

detention, and that public refrigerated warehouses are distinguishable from private warehouses in their purposes and practices. It opposes any relitigation of the law regarding responsibility for payment of detention charges, with respect to those who are not parties to the transportation contract and it requests the Commission to adhere to precedent as upheld by the courts. It opposes any reduction in free time contending that there is no factual basis to justify such reductions.

3. *Ramcon, Inc.*—Ramcon, a freight consolidator serving chain retail stores and shipper associations, protests several sections of the proposed rule. It contends that section 1 e) of the proposed appendix A nullifies the protection section 1(b) of the rule is intended to provide since the carrier's opinion is made enforceable without regard to which party is either actually caused the delay. Ramcon fears being penalized with detention charges when delays lie outside its control, and it gives examples of instances where attributable causes of detention are not under a consignee's control: (1) shipments of low density or high density small packages loaded with an exceptionally high number of pieces, (2) disagreements between carrier and consignee concerning the count after the freight has been distributed through the warehouse, (3) freight poorly packaged and rattling or cartons broken open requiring inspection and retaping, (4) inefficient performance of the carrier's employee, (5) and delays in the use of consignees facilities resulting from earlier delays for the above reasons. As an alternative to the proposed rule, Ramcon proposes that the detention charge be billed to the payor of the freight charge with the actual liability left to the private parties to negotiate on the basis of the facts. Because line-haul rates include a reasonable cost of delivery, when this condition is violated by the occurrence of detention the implied condition of the contract fails and the carrier should be allowed to recoup extra cost not due to his control from the payor, any other rule can be prejudicial. It opposes aggregating weights under the LTL rule contending that each LTL shipment is a contract in itself and should not be adversely affected due to the convenience of a carrier in his delivery or the poor shipping practices of other shippers. Moreover, it feels that the carrier should not be allowed the additional revenue of LTL detention when the carrier is saving cost by consolidating his delivery to a consolidator. Ramcon supports prearranged scheduling to prevent extreme variations in volume that overtax normally adequate facilities.

4. *Professional Drivers Council for Safety and Health.*—PROD, an association of drivers the majority of which are employed by common carriers, limits its participation to a discussion of the general labor considerations underlying the policy favoring vehicle detention penalties. It points out the effects of vehicle detention on safety. When detention occurs during a driver's 15-hour "onduty" work day, the temptation is great for logging it as "off-duty" since he will stand to run out of hours on his daily and weekly limits sooner, and he receives little if any compensation for time taken by detention. A safety hazard results from the numerous drivers around the country heading back on to the highways without additional rest yet with many of their on duty hours remaining before then. PROD submits that the Commission should force the maximum utilization of drivers during the shortest period of time to reduce the hazard, but concludes that the proposed rules do not do enough to discourage all avoidable detention. PROD supports vehicle detention particularly when tacked on as an additional charge contending that it would create a more favorable economy, promote efficiency and reduce detention time with the commensurate reduction in safety hazards.

APPENDIX III

TABLE I

Computation of pickup and delivery hourly costs and weighted average detention charges

Line No.	Item	P&D hourly expenses[1]	Cost update ratio from Statement No. 2C1-73[2]	P&D hourly expenses at 1973 cost level (col. 2 x col. 3)	Hours in P&D service[3]	1973 variable P&D hourly cost (col. 4 ÷ col. 5)	1973 fully allocated hourly P&D cost (col. 6 x 1.1111)	1973 level of detention charges[4]	1975 level of detention charges[5]
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1	Central	$216,946,384	1.07665	$233,575,324	29,497,488	$7.92	$8.80	$13 24	$13.98
2	East Central	158,430,144	1.09395	173,314,656	20,964,240	8.27	9.19	15.93	17.15
3	New England	76,599,840	1.04502	80,048,496	10,553,381	7.59	8.43	18.20	20.30
4	Middle Atlantic	255,575,568	1.21253	309,893,043	39,927,040	7.76	8.62	10.00	12.00
5	Southern	160,539,152	1.17868	189,223,923	27,304,804	6.93	7.70	13.61	15.07
6	South Central	36,713,040	1.16125	42,633,018	5,566,408	7.66	8.51	12.76	14.15
7	Middlewest	248,102,122	1.33523	331,273,975	43,716,868	7.58	8.42	14.65	16.46
8	Rocky Mountain	16,419,183	1.45173	23,836,221	2,715,272	8.78	9.76	16.22	18.15
9	Weighted average	xxx	xxx	1,383,798,656	180,245,501	7.68	8.53	[6]13.55	[6]15.11

[1]Highway Form A, Schedule A, Sheet 6, line 132, column 2 for applicable region.
[2]Table I, line 3, column 6.
[3]Highway Form A, Schedule A, Sheet 6, line 132, column 4 for applicable region.
[4]Detention charges shown in column 8 were all effective August 13, 1973.
[5]Detention charges shown in column 9 were all effective April 1, 1975.
[6]Detention charges shown in columns 8 and 9 weighted by the hours in P&D service shown in column 5.

TABLE 2

Regional comparison of charges for detention of vehicles without power and storage

	Item	Detention[1]	Item	Storage[2]
ICC ECA 149-J (Effective December 28, 1974)	501	$21.42	910	$21.42
		28.57		28.57
		42.83		42.83
ICC CSA 127-A (Effective November 28, 1974)	501	17.04	910	17.04
		25.49		25.49
		42.46		42.46
ICC CMB 100-C (Effective April 14, 1975)	501	17.46	910	17.46
		23.28		23.28
		34.92		34.92
MAC Tariff 10-X MF ICC A-2510 (Effective April 30, 1974)	'80	21.22	90	19.06
		28.29		25.41
		42.44		38.12
ICC MWB 125-A (Effective June 30, 1974)	501	17.82	910	17.82
		22.30		22.30
		36.95		37.16
ICC NEB A-315 (Effective May 18, 1973)	'1815-I	20.73	1880	24.45
				32.60
				48.80
ICC RMB 100 (Effective August 11, 1973)	501	22.67	910	22.65
		29.65		30.24
		45.35		45.35
SMC Tariff 517-H MF ICC 1783 (Effective July 13, 1974)	'501	17.30	910	17.30
		23.07		23.07
		34.60		34.60

[1]Charges are for the first, second, and subsequent 24-hour periods, respectively.

[2]Charges are for the first, second, and subsequent 24-hour periods, respectively and are generally applicable per shipment or vehicle for freight moving subject to truckload, volume, capacity load, and exclusive use rates. MAC includes expedited service, while CMB and NEB do not include volume.

[3]Charges are for unloading during first three 24-hour periods, the fourth 24-hour period, and subsequent 24-hour periods.

[4]One charge regardless of duration of detention.

[5]Charges are for unloading.

APPENDIX IV

NOTICE OF PROPOSED RULEMAKING AND ORDER[1]

49 CFR CHAPTER X PART 1307.35 (e)

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on this 22nd day of May 1973

Ex Parte No. MC-88

DETENTION OF MOTOR VEHICLES-NATIONWIDE

The failure of motor common carriers of property to provide uniform vehicle detention rules, including prearranged schedules, has given rise to shipper and carrier complaints alleging unjust and unreasonable practices, unjust discrimination, preference and prejudice, as well as unlawful concessions and rebates.

A number of inquiries have also been received as to whether arrangements for prearranged schedules may be made without provisions therefor being published in applicable tariffs lawfully on file with this Commission.

In view thereof, this proceeding is being initiated to examine and consider: (1) the need for requiring all motor common carriers of property subject to the jurisdiction of this Commission to publish and maintain their tariffs and file with this Commission uniform rules—nationwide—to govern the assessment and collection of vehicle detention charges applicable on interstate shipments moving subject to volume, truckload, less-than-truckload (LTL), or any quantity (AQ) rates; (2) the need for requiring the publication of provisions therein requiring prearranged schedules to be established for the pickup and delivery of such shipments as a part of uniform vehicle detention rules; (3) if prearranged schedules are necessary, whether such provisions are necessary with respect to (a) volume shipments, (b) truckload shipments, (c) LTL shipments, and (d) AQ shipments, or any one or more of these four categories of shipments; (4) the lawfulness of carriers and shippers or receivers entering into voluntary prearranged schedules for the pickup or delivery of interstate shipments without tariff provisions authorizing such arrangements having first been published in tariffs lawfully on file with this Commission; and (5) the level of vehicle detention charges to be assessed and collected for such service.

It is the duty of this Commission under the Interstate Commerce Act to require that motor common carriers provide lawful, nondiscriminatory, reasonable and adequate service and reasonable rates and charges. Therefore, the purpose of this rulemaking proceeding is to discourage undue delays of carriers' vehicles at origins, stopoff points, and destinations at the same time to assure lawful, nondiscriminatory, nonpreferential, nonprejudicial, reasonable, and adequate service, and reasonable vehicle detention rates and charges with respect to all classes, types, and sizes of shippers and receivers of interstate freight shipments, nationwide.

Additionally, it is timely and otherwise appropriate and desirable to facilitate the simplification of carrier tariff provisions regarding vehicle detention so as to effect maximum utilization of automated systems techniques in the publication, application, and policing of detention rules and charges by carriers and shippers alike.

[1]Service date June 22, 1973. Notice of correction service date July 17, 1973.

Precedent exists for the prescription of uniform detention rules and charges. In docket No. 33434, *Detention of Motor Vehicles—Middle Atl. & New England*, 325 I.C.C. 336, decided April 23, 1965, this Commission prescribed uniform detention rules, with certain exceptions, to govern truckload shipments and all respondents thereto were required to establish appropriate tariff provisions within 60 days of the date that order became effective. At page 343, thereof, we stated:

We find that a uniform detention rule, except as otherwise set forth herein, is necessary for economical and efficient transportation service by the respondents, and is in the public interest, and that the detention rule set forth in appendix E hereto is just and reasonable, and should be established and maintained by respondents, as set forth in the appended order.

The exceptions permitted thereunder were household goods, commodities transported in bulk in tank trucks, commodities transported by heavy haulers, and articles picked up from or delivered to railroad cars, and certain palletized shipments subject to rule 15 of Middle Atlantic Conference, Agent, tariff 10 series, or other rules of similar character in other tariffs.

Accordingly, proposed uniform vehicle detention rules, including provisions for prearranged schedules, are set forth in the appendixes hereto, for nationwide application.

It is for these purposes that the instant rulemaking proceeding is instituted.

Upon consideration of the above-described matters and good cause appearing therefor:

It is ordered, That a proceeding be, and it is hereby, instituted under authority of part II of the Interstate Commerce Act (49 U.S.C. 301 *et seq.*) including sections 204(b), 208(a), 216(b), and (d), 217(a), (b), and (d), and 222(c), thereof, and pursuant to 5 U.S.C. 553 and 559 (the Administrative Procedure Act), to determine whether the facts and circumstances require or warrant the adoption of the proposed regulations set forth in the appendixes A through C to this notice, or other regulations of similar purport applicable to motor common carriers of property operating in interstate or foreign commerce subject to the Interstate Commerce Act, and for the purpose of taking such other and further action as the facts and circumstances may justify or require.

It is further ordered, That all motor common carriers of property operating in interstate or foreign commerce within the United States, and subject to the Interstate Commerce Act, except those transporting exclusively, (1) household goods, (2) commodities in bulk in tank trucks, (3) heavy and specialized commodities or articles, requiring special handling, and (4) articles picked up from or delivered to railroad cars having prior or subsequent transportation by rail, be, and they are hereby, made respondents in this proceeding.

It is further ordered, That the Bureau of Enforcement of this Commission be, and it is hereby, authorized and directed to participate in this proceeding.

It is further ordered, That no oral hearing be scheduled for the receiving of testimony in this proceeding unless a need therefor should later appear, but that respondents or any other interested persons may participate in this proceeding by submitting for consideration written statements of facts, views, and arguments on the subjects mentioned above, or any other subjects pertaining to this proceeding.

It is further ordered, That any person intending to participate in this proceeding by submitting initial or reply statements, or otherwise, shall notify this Commission, by

filing with the Interstate Commerce Commission, Office of Proceedings, Room 5354, Washington, D.C. 20423, on or before August 8, 1973, the original and one copy of a statement of his intention to participate. Inasmuch as the Commission desires wherever possible (a) to conserve time, (b) to avoid unnecessary expense to the public, and (c) the service of pleadings by parties in proceedings of this type only upon those who intend to take an active part in the proceeding, the statement of intention to participate shall include a detailed specification of the extent of such person's interest, including (1) whether such interest extends merely to receiving Commission releases in this proceeding, (2) whether he genuinely wishes to participate by receiving or filing initial and/or reply statements, (3) if he so desires to participate as described in (2), whether he will consolidate or is capable of consolidating his interests with those of other interested parties by filing joint statements in order to limit the number of copies of pleadings that need be served, such consolidation of interests being strongly urged by the Commission, and (4) any other pertinent information which will aid in limiting the service list to be used in this proceeding; that this Commission shall then prepare and make available to all such persons a list containing the names and addresses of all parties desiring to participate in this proceeding and upon whom copies of all statements must be filed; and that at the time of this service list the Commission will fix the time within which initial statements and replies must be filed.

Appendix A to the Notice of Proposed Rulemaking and Order

PROPOSED VEHICLE DETENTION RULE

PROPOSED VEHICLE DETENTION RULE

This item applies when carriers' vehicles (Note A) are delayed or detained at premises of consignor, consignee, or other places designated by consignor or consignee, subject to the following provisions:

SEC. 1 General provisions.—(a) This item applies only to vehicles which have been ordered or used to transport shipments subject to truckload rates. If the shipment is moving on a rate subject to a stated minimum weight of 12,000 pounds or more; and such rate is not designated as a truckload rate, it will be considered a truckload rate for the purpose of applying this item.

(b) This item applies only when vehicles are delayed or detained at the places of pick up or delivery and only when such delay or detention is attributable to consignor, consignee, or others designated by them.

(c) Free time for each vehicle will be as provided in section 3.

(d) After the expiration of free time as herein provided, charges as provided in section 4 will be assessed against the shipment.

(e) When section 7 of the bill of lading is executed, carrier will not deliver the shipment to consignee unless detention charges, if accrued, are guaranteed.

SEC. 2 Computation of time.—(a) The time per vehicle shall begin to run upon notification by the driver to the responsible representative of the consignor or consignee at the place of pickup or delivery of the arrival of the vehicle for loading or unloading, as the case may be, either on the premises designated by the consignor or consignee, or as close thereto as conditions on said premises will permit, and shall end upon completion of loading or unloading and receipt by the driver of a signed bill of lading or receipt for delivery, as the case may be, except as provided in paragraph (b) of this section. Time, if any, necessary to prepare a vehicle for loading or unloading, as the case may be, will be excluded from the computation of time.

Upon request of consignor or consignee, or others designated by them, carrier will enter into a reasonable prearranged schedule for arrival of the vehicle for loading or unloading.

Exception—When carrier makes a prearranged schedule with consignor or consignee, or others designated by them, at place of pickup or delivery for the arrival of the vehicle for loading or unloading and carrier is unable for any reason to maintain such schedule within 30 minutes, the time shall begin to run from the commencement of loading or unloading and not from the time of arrival of the vehicle. If carrier's vehicle arrives prior to scheduled time, the time shall begin to run from the scheduled time or actual time loading or unloading commences, whichever is earlier.

(b) Computations of time are subject to, and are to be made within the normal business (shipping or receiving) day at the designated premises at place of pickup or delivery, except, if carrier is permitted to work beyond this period, such working time shall also be included. When loading or unloading is not completed at the end of such day, time will be resumed at the beginning of the next such day, or when work the next day is actually begun by carrier, if earlier. When loading or unloading carries through a normal meal period, meal time, not to exceed 1 hour, will be excluded from computation of time.

SEC. 3 Free time.—Free time shall be as follows:

Column A		Column B	
Actual weight in pounds per vehicle	Free time in minutes	Actul weight in pounds per vehicle stop	Free time in minutes per vehicle stop
Less than 24,000	240	Less than 10,000	90
24,000 and less than 36,000	300	10,000 and less than 20,000	180
36,000 or more	360	20,000 and less than 24,000	240
		24,000 and less than 36,000	300
		36,000 or more	360

Column A—Applies to vehicle containing truckload shipments requiring only one vehicle, or to fully loaded vehicles containing truckload shipments requiring more than one vehicle, except as provided in Column B.

Column B—Applies to last vehicle used in transporting overflow truckload shipments requiring two or more vehicles, or to vehicles containing truckload shipments stopped for completion of loading or partial unloading.

SEC. 4 Charges.—When the delay per vehicle beyond free time is:

The charge per vehicle will be:

1 hour or less	$
Over 1 hour but not over 75 minutes	
Over 75 minutes but not over 90 minutes	
Over 90 minutes but not over 105 minutes	
Over 105 minutes but not over 120 minutes	
Over 120 minutes but not over 135 minutes	
Over 135 minutes but not over 150 minutes	
Over 150 minutes but not over 165 minutes	
Over 165 minutes but not over 180 minutes	
Over 180 minutes	

SEC. 5 Records.—A record of the following information must be maintained by the carriers and kept available at all times:

(a) Name and address of consignor, consignee, or other party at whose place of business freight is loaded or unloaded.

(b) Identification of vehicles tendered for loading or unloading.

(c) Date and time of notification of the arrival of the vehicle for loading and unloading.

(d) Date and time loading or unloading begins.

(e) Date and time loading or unloading is completed.

(f) Date and time vehicle is released for departure by consignor, consigneee, or by other party at place of pickup or delivery after loading or unloading is completed.

(g) Total actual weight of shipment loaded or unloaded.

(h) Whether vehicles are tendered under a prearranged schedule for loading or unloading.

(i) When vehicles are tendered under a prearranged schedule for loading or unloading, date and time specified therefor.

Nothing in this item shall require a carrier to pick up or deliver freight at hours other than such carrier's normal business hours.

Note A: "Vehicles" as used in this item means straight trucks or tractor-trailer combinations, except that this item will not apply to trailers without power units left by carrier at place of pickup or delivery of consignor, consignee, or other party designated by them. (See Items———— series and ———— when trailers without power units are left by carrier.)

Appendix B to the Notice of Proposed Rulemaking and Order

PROPOSED VEHICLE DETENTION RULE

SPOTTING OF TRAILERS

When equipment is available, carrier may spot empty or loaded vehicles at consignor's or consignee's premises for loading or unloading in full possession of the consignor or consignee, unattended by carrier's employees and unaccompanied by power unit, subject to the following conditions and charges:

SEC. 1 Loading or unloading.—(a) Loading or unloading will be performed by consignor or consignee and in the case of spotting for loading the Bill of Lading must show "Shipper load and count."

(b) Carrier's responsbiliity for shipments loaded in trailers which are spotted under provisions of this item shall begin when loaded has been completed and possession thereof is taken by the carrier. Carrier's responsibility for shipments delivered in trailers which are spotted under the provisions of this item will cease at the time the trailer is spotted at or on the place of delivery designated by the consignee.

SEC. 2 Free time, after 7 a.m., on the day following that on which the vehicle is spotted.—(a) On vehicles spotted for unloading, 8 hours.

(b) On vehicles spotted for loading, 8 hours, when the vehicle is placed at consignor's platform.

SEC. 3 Computation of time.—(a) Consignor or consignee will notify carrier when loading or unloading is in fact completed and trailer is available for pickup and the trailer will be deemed to be held until the time the carrier is so notified.

Note A: *Notification* means advice to consignor by carrier in connection with loading, or advice to carrier by consignee in connection with unloading, by mail or telegraph that trailer is loaded or unloaded as the case may be. If convenient and practicable, advice may be given by telephone, confirmed, however, in writing.

(b) In computing time, Sundays and legal holidays (national, State, or municipal) will in all cases be excluded.

(c) Upon request of consignor or consignee, or others designated by them, carrier will enter into a reasonable prearranged schedule for arrival of the vehicle for loading or unloading.

SEC. 4 Charges.—

(a) Loading:

	Charge
After expiration of free time the charge per trailer for each 24 hours or fraction thereof that the trailer is held will be (note A).....	

(b) Unloading: After expiration of free time the charge per trailer shall be:

(1) For each of the first three 24-hour periods or fraction thereof that the trailer is held.....	
(2) For the fourth 24-hour period or fraction thereof that the trailer is held.....	
(3) For the fifth and each succeeding 24-hour period or fraction thereof that the trailer is held.....	

SEC. 5 Pick up of trailer.—No charge will be made for picking up trailers spotted under this item when such pickup can be performed in 30 minutes after arrival of driver and power unit at consignor's or consignee's premises. Where a delay of more than 30 minutes is encountered, detention charges as specified in item———————— will be assessed.

SEC. 6 Carriers will not spot trailers equipped with temperature control except that such equipment may be spotted at the charge provided for in this item for pickup or delivery of freight which does not require temperature control.

SEC. 7 Strike interference.—When because of a strike of its employees, it is impossible for consignor or consignee to make available for movement by carrier, loaded or empty vehicles detained on consignor's or consignee's premises, a charge of $ per day or fraction thereof will be made for such detention (notes A and B).

Note A: No charge will be assessed for empty trailers not constructively placed for loading. Carrier reserves the right to remove such trailers at any time.

Note B: Not applicable to vehicle furnished by water carriers or by the railroads.

Appendix C to the Notice of Proposed Rulemaking and Order

PROPOSED VEHICLE DETENTION RULE

APPLICABLE ONLY ON LTL OR AQ SHIPMENTS

SEC. 1 General provisions.—(a) Except as otherwise specifically provided, when the loading or unloading of freight (note A) is delayed, and such delay is attributable to the consignor, consignee or other designated by them, beyond the free time

authorized in section 3, computed in accordance with section 2, charges in section 4 will be assessed against the consignor (note B), if the delay occurs at his premises and against the consignee (note B), if the delay occurs at his premises (see exception).

(b) When section 7 of the bill of lading is executed, carrier will not deliver the shipment to consignee unless detention charges, if accrued, are guaranteed.

(c) Not applicable on LTL or AQ shipments loaded on same vehicle in multiple tender or unloaded from same vehicle in multiple delivery with shipments subject to truckload rates or subject to a stated minimum weight of 12,000 pounds or more. Apply provisions of item

SEC. 2 Computation of time.—(a) The time consumed in loading or unloading freight shall be computed from the time of arrival until the time of departure of the vehicle, either on the premises of the consignor or consignee, or as close thereto as conditions on such premises (for under the control of consignor or consignee) will permit, including waiting time in reaching or leaving loading or unloading location. The time per vehicle shall begin to run upon notification by the driver to the responsible representative of the consignor or consignee that the vehicle is available for loading or unloading as the case may be. If the consignor or consignee refuses to sign carrier's record, the time specified by the driver of the vehicle shall be binding.

The computation of time under this item begins and ends with the business hours of consignor or consignee. When loading or unloading is not completed at the end of a business day, the computation of the time will be resumed at the beginning of the next business day. When loading or unloading vehicle carries through a normal meal period, meal time, not to exceed 1 hour, will be excluded from computation of time.

Upon request of consignor or consigneee, or others designated by them, carrier will enter into a reasonable prearranged schedule for arrival of the vehicle for loading or unloading, provided at least 10,000 pounds are offered for pickup by consignor making such request or at least 10,000 pounds are available for delivery to consignee making such request (see exception).

Exception.—When carrier makes a prearranged schedule with consignor or consignee, or others designated by them, at place of pickup or delivery for the arrival of the vehicle for loading or unloading and carrier is unable, for any reason, to maintain such schedule within 30 minutes, the time shall begin to run from the commencement of loading or unloading and not from the time of arrival of the vehicle. If carrier's vehicle arrives prior to scheduled time, the time shall begin to run from the scheduled time or actual time loading or unloading commences, whichever is earlier.

(b) In case of multiple shipments subject to LTL or AQ rates received from one shipper or delivered to one consignee at one time on the vehicle, time will be computed on the aggregate weight of the multiple shipments so received or delivered. Where there is more than one payor, charges will be prorated on the basis of the weight of each individual shipment. Where either a single shipment or such multiple shipments subject to LTL or AQ rates exceed the carrying capacity of one vehicle, free time for each vehicle shall be computed separately.

SEC. 3 Free time.—Free time for the loading or unloading of freight will be allowed as follows:

For the first 1,750 lbs. or less----------	30 minutes (note C)
For each additional 1,750 lbs. or fraction thereof----------	15 minutes (note C)

	Charge
	$

SEC. 4 Charges.—When the loading or unloading of freight is delayed beyond free time, charge per vehicle for each 15 minutes or fraction for time consumed for such delay shall be ----------

SEC. 5 Redelivery.—The foregoing provisions of this item shall apply to an original delivery or tender of delivery of the shipment as well as to any redelivery or subsequent tender of delivery.

SEC. 6 Collection (Pickup) or delivery provisions in this or other tariffs.—The provisions of this item do not change or prevent the application of other items in this or other tariffs lawfully on file with the Interstate Commerce Commission covering pickup or delivery of freight. Nothing in this item shall require a carrier to pick up or deliver freight at hours other than such carrier's normal hours.

Note A: If shipments are refused when offered for delivery item will apply.

Note B: The amounts due the carrier under the provisions of this rule shall be assessed against the consignor in case of loading, and against the consignee in the case of unloading, irrespective of whether line-haul charges are prepaid or collect.

Note C: In the case of multiple shipments received from one shipper or delivered to one consignee at one time on the vehicle, free time will be increased 5 minutes for each shipment subject to a maximum of 30 minutes additional free time.

APPENDIX V

(Regulations adopted)

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER B - OTHER REGULATIONS RELATING TO TRANSPORTATION
PART 1307 - FREIGHT RATE TARIFFS, SCHEDULES, AND CLASSIFICATIONS OF MOTOR CARRIERS
SUBPART B - COMMON CARRIER FREIGHT TARIFFS AND CLASSIFICATIONS
§1307.35 - TERMINAL AND SPECIAL SERVICES

Amend 49 CFR §1307.35 "terminal and special services," by adding thereto as 1307.35(e) the following:

(e) *Detention of vehicles.*—The following rules apply to all shipments except shipments of household goods; commodities transported in bulk in tank truck, dump trucks, vehicles pneumatically unloaded and other self-unloading mechanized vehicles; heavy and specialized commodities or articles requiring special equipment or handling outside the scope of the certificates of general-commodities motor common carriers; livestock other than ordinary; articles picked up or delivered to railroad care having prior or subsequent transportation by rail; and shipments to consignors and consignees of waterborne commerce at marine terminal facilities to the extent that the marine terminal operator would be liable to the motor common carrier for truck detention under any applicable detention rule promulgated pursuant to the authority of the Federal Maritime Commission.

All common carriers of property by motor vehicle subject to Interstate Commerce Act excepting those specifically excluded, *supra*, shall publish the below rule entitled "Detention-Vehicles With Power Units" and all such carriers engaging in the practice of spotting shall also publish the below rule entitled "Detention-Vehicles Without

Power Units." The wording of the following rules may not be varied except where clearly warranted by exceptional circumstances, and where appropriate, the word "rule" may be substituted for the word "item."

(1) *Detention-vehicles with power units.*—This item applies when carrier's vehicles with power units are delayed or detained on the premises of consignor, consignee, or on other premises designated by them, or as close thereto as conditions will permit, subject to the following provisions:

Section 1. General provisions.—(a) This item applies only to vehicles which have been ordered or used to transport shipments subject to truckload rates. For the purposes of this item, the term truckload rates shall be considered to include shipments moving on a rate subject to a stated minimum weight of 10,000 pounds or more when not designated as a truckload rate, and, where applicable, shipments which are assessed charges based on the provisions of a Capacity Load Rule or are accorded Exclusive Use of Vehicle Service or Expedited Service.

(b) This item applies only when vehicles are delayed or detained at the premises of pickup or delivery and only when such delay or detention is not attributable to the carrier.

(c) Free time for each vehicle will be as provided in section 4. After the expiration of free time, charges will be assessed as provided in section 5.

(d) The detention charges due the carrier will be assessed against the consignor in the case of loading and against the consignee in the case of unloading, irrespective of whether line-haul charges are prepaid or collect. When detention charges are attributable to others who are not parties to the Bill of Lading contract, the charges will be assessed against the shipment. (See Note A.)

(e) When carrier's employee assists in loading, unloading, or checking the freight, this item will apply whether or not the power unit is actually detained.

(f) Nothing in this item shall require a carrier to pick up or deliver freight at hours other than carrier's normal business hours. This shall not be construed to restrict a carrier's ability to accept pickup and delivery schedules at hours other than its normal business hours.

Section 2. Definitions.—The following general definitions will apply when the below terms are used in this item:

(a) "Vehicle" means straight trucks or tractor-trailer combinations used for the transportation of property.

(b) "Loading" includes furnishing carrier with the Bill of Lading, forwarding directions, or other documents necessary for forwarding the shipment.

(c) "Unloading" includes: (1) Surrender of the Bill of Lading to the carrier on shipments billed "To Order,"

(2) Payment of lawful charges to the carrier when required prior to delivery of the shipment,

(3) Notification to the carrier that vehicle is unloaded, and

(4) Signing of the delivery receipt.

(d) "Premises" means the entire property at or near the physical facilities of consignor, consignee, or other designated party.

(e) "Site" means a specific location at or on the premises of consignor, consignee, or other designated party.

(f) "Normal nonworking periods" means meal, coffee, and rest breaks.

(g) "Pallet" means pallets, platforms, shipping racks, or skids with or without standing sides or ends, but without tops.

Section 3. Computation of time.—(a) Commencement and termination: (1) The time per vehicle shall begin to run upon actual notification by carrier's employee to a responsible representative of consignor, consignee, or other designated party at the premises of pickup or delivery of the arrival of the vehicle for loading or unloading. Upon such notification, the responsible representative of consignor, consignee, or other designated party may enter the time of arrival onto the carrier's detention record. If the representative refuses to enter the time, then carrier's employee will enter the time and it will be binding upon each party.

(2) Time shall end upon completion of loading or unloading except as provided for in paragraph (c) of this section. Upon such completion, a responsible representative of consignor, consignee, or other designated party may enter the time of completion onto the carrier's detention record. If the representative refuses to enter the time, then carrier's employee will enter the time and it will be binding.

(b) Prearranged scheduling: (1) Subject to the provisions of item *, and upon reasonable request of consignor, consignee, or others designated by them, carrier will without additional charge enter into a prearranged schedule for arrival of the vehicle for loading or unloading.

(2) When the carrier enters into a prearranged schedule with consignor, consignee, or others designated by them for the arrival of the vehicle for loading or unloading and carrier is unable for any reason to maintain such schedule, then carrier and consignor, consignee, or other party designated by them have the option to agree to a mutually convenient and prompt alternative arrival time or in the event such agreement cannot be reached, to compute detention time against consignor, consignee, or other party designated by them from carrier's actual arrival time subject to an extension of 15 minutes for each 15 minutes, or fraction thereof, the vehicle is delayed beyond the originally scheduled arrival time; in no case shall such extended free time exceed 60 minutes.

(3) If carrier's vehicle arrives prior to scheduled time, time shall begin to run from the scheduled time or actual time loading or unloading commences, whichever is earlier.

(c) Conditions governing the computation of time: (1) Computations of time are subject to and are to be made within the normal business hours at the designated place of pickup or delivery. If carrier is permitted to work beyond this period, such working time shall also be included.

(2) When loading or unloading is not completed at the end of normal business hours at the designated place, consignor, consignee, or other party designated by them shall have the option: (i) to request that the vehicle without power remain at its premises subject to the provisions of section 4(d); or

(ii) to request that the vehicle with power be returned to carrier without being subject to charges for storage or redelivery so long as free time has not yet expired. When the vehicle is returned for completion of loading or unloading the computation of any remaining free time will resume. If free time has expired and detention has begun to accrue, storage or redelivery charges as may otherwise be provided will be assessed.

(3) When carrier's employee interrupts loading or unloading by the taking of any normal nonworking periods, any such time will be excluded from the computation of free time, or will be excluded from the computation of time in excess of free time.

Section 4. Free time.—(a) Free time shall be computed as follows:

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*Here the carrier is to identify its pertinent rule.

Actual weight in pounds per vehicle stop (see Note B)	*Free time in minutes per vehicle stop*
Less than 10,000	120
10,000 but less than 20,000	180
20,000 but less than 28,000	240
28,000 but less than 36,000	300
36,000 or more	360

(b) When at least 90 percent of the shipment weight (exclusive of pallet weight) is loaded on pallets, or when shipment is loaded on flat-bed or other open-top equipment, free time shall be one-half that amount normally applicable for the weight.

(c) When more than one truckload shipment or a truckload shipment and one or more less-than-truckload (LTL) or any quantity (AQ) shipments are loaded on one vehicle at the premises of consignor or when more than one truckload shipment or a truckload shipment and one or more LTL or AQ shipments are unloaded from one vehicle at the premises of consignee or other designated party, the combined weight will be used to determine free time; in all other instances the individual shipment weight will be used.

(d) When a vehicle with power is changed to a vehicle without power at the request of consignor, consignee, or other party designated by them, the free time and detention charges will be applied as follows: (1) If the change is requested and made before the expiration of free time for a vehicle with power, free time will cease immediately at the time the request is made, and detention charges for vehicles without power will immediately commence with no further free time allowed.

(2) If the change is requested and made after the expiration of free time for a vehicle with power, free time and detention charges will be computed on the basis of a vehicle with power up to the time the change was requested. In addition thereto, the vehicle will immediately be charged detention for vehicles without power with no further free time allowed.

(e) When a vehicle is both unloaded and reloaded, each transaction will be treated independently of the other, except that when loading is begun before unloading is completed, free time for loading shall not begin until free time for unloading has elapsed.

(f) Loading or unloading at more than one site at or on the premises of consignor, consignee, or other designated party shall constitute one vehicle stop.

Section 5. Charges.—When the delay per vehicle beyond free time is 1 hour or less the charge will be $18. For each additional 30 minutes or fraction thereof, the charge will be $9.

Section 6. Records.—A written record of the following information must be maintained by the carrier on all truckload shipments, and such record must be kept available at all times:

(a) Name and address of consignor, consignee, or other party at whose premises freight is loaded or unloaded;

(b) Identification of vehicle tendered for loading or unloading;

(c) Date and time of notification of arrival of the vehicle for loading or unloading;

(d) Date and time loading or unloading is begun;

(e) Date and time loading or unloading is completed;

(f) Date and time vehicle is released by consignor, consignee, or other party at place of pickup or delivery after loading or unloading is completed;
(g) Actual time of nonworking periods;
(h) Total actual weight of shipment or shipments loaded or unloaded;
(i) Whether articles are tendered under a prearranged schedule for loading or unloading;
(j) Date and time specified for vehicles tendered under a prearranged schedule;
(k) Alternative arrangement made when a vehicle is tendered under a prearranged schedule that was not adhered to.

Note A. At those marine terminal facilities where Federal Maritime Commission detention charges apply, carrier charges pursuant to this rule will be assessed against the shipment to the extent such charges exceed those of the Federal Maritime Commission.

Note B. Also applies to the last vehicle used in transporting overflow truckload shipments, or to vehicles containing truckload shipments stopped for completion of loading or partial unloading.

(2) Detention-vehicles without power units spotting or dropping of trailers (Note).—This item applies when carrier's vehicles without power units are delayed or detained on the premises of consignor, consignee, or on other premises designated by them, or as close thereto as conditions will permit, subject to the following provisions:

Section 1. General provisions.—(a) Subject to the availability of equipment, carrier will spot empty or loaded trailers for loading or unloading on the premises of consignor, consignee, or on other premises designated by them, or as close thereto as conditions will permit.

(b) Loading or unloading will be performed by consignor, consignee, or other party designated by them. When carrier's employee assists in loading, unloading, or checking the freight, the detention provisions governing vehicles with power units will apply. In the case of spotting for loading the Bill of Lading must show "Shipper Load and Count."

(c) Carrier responsibility for safeguarding shipments loaded into trailers spotted under the provisions of this item shall begin when loading has been completed and possession thereof is taken by the carrier.

(d) Carrier responsibility for safeguarding shipments unloaded from trailers spotted under the provisions of this item shall cease when the trailer is spotted at or on the site designated by consignee.

(e) Free time for each vehicle will be as provided in section 3. After the expiration of free time charges will be assessed as provided in section 4.

(f) The detention charges due the carrier will be assessed against the consignor in the case of spotting for loading and against the consignee in the case of spotting for unloading irrespective of whether charges are prepaid or collect.

(g) Nothing in this item shall require a carrier to pickup or deliver spotted trailers at hours other than carrier's normal business hours. This shall not be construed as a restriction on carrier's ability to pick up or deliver spotted trailers at hours other than its normal business hours.

Section 2. Definitions.—The following general definitions will apply when the below terms are used in this item:

(a) "Vehicle" means tractor-trailer combinations used for the transportation of property, where: (1) "Trailer" means mobile units used to transport property, and
(2) "Tractor" means a mechanically powered unit used to propel or draw a trailer or trailers upon the highways.
(b) "Loading" includes: (1) Furnishing of the Bill of Lading, forwarding directions, or other documents necessary for forwarding the shipment to the carrier, and
(2) Notification to the carrier that the vehicle is loaded and ready for forwarding.
(c) "Unloading" includes: (1) Surrender of the Bill of Lading to the carrier on shipments billed "To Order."
(2) Payment of lawful charges to the carrier when required prior to delivery of the shipment.
(3) Notification to the carrier that vehicle is unloaded and ready for forwarding, and
(4) Signing of delivery receipt.
(d) "Premises" means the entire property at or near the physical facilities of consignor, consignee, or other designated party.
(e) "Site" means a specific location at or on the premises of consignor, consignee, or other designated party.
(f) "Spotting" means the placing of a trailer at a specific site designated by consignor, consignee, or other party designated by them, detaching the trailer, and leaving the trailer in full possession of consignor, consignee, or other designated party unattended by carrier's employee and unaccompanied by power unit. Carrier will not move the trailer until such time as it has received notification, pursuant to section 3, that the trailer is ready for pickup. Consignor, consignee, or other designated party may shift the spotted trailer with its own power units at its own expense and risk for the purpose of loading or unloading.

Section 3: Computation of free time.— (a) Commencement of spotting and free time: (1) Spotted trailers will be allowed 24 consecutive hours of free time for loading or unloading. Such period shall commence at the time of placement of the trailer at the site designated by consignor, consignee, or other party designated by them. Upon the expiration of the 24 hours of free time, detention charges will accrue as provided in section 4.

(2) When any portion of the 24-hour free time extends into a Saturday, Sunday, or holiday (national, State, or municipal), the computation of time for such portion shall resume at 12:01 a.m. on the next day which is neither a Saturday, Sunday, or holiday.

(3) Free time shall not begin on a Saturday, Sunday, or holiday (national, State or municipal), but at 8 a.m. on the next day which is neither a Saturday, Sunday, or holiday.

(4) When a trailer is both unloaded and reloaded, each transaction will be treated independently of the other, except that when unloading is completed, free time for loading shall not begin until free time for unloading has elapsed.

(b) Termination of spotting and notification: (1) Consignor, consignee, or other party designated by them shall notify carrier when loading or unloading has been completed and the trailer is available for pickup. The trailer will be deemed to be spotted and detention charges will accrue until such time as the receives notification. Notification by telephone if convenient and practical, otherwise by telegraph or mail shall be given by consignor, consignee, or other party designated by them at their own expense, to carrier or other party designated by carrier for the purpose of advising such carrier or other party that the spotted trailer has been loaded or unloaded and is

ready for pickup. If notification is by telephone, carrier may require written confirmation.

(2) When a spotted trailer is changed to a vehicle with power at the request of consignor, consignee, or other party designated by them, the free time and detention charges will be applied as follows:

(i) If the change is requested and made before the expiration of free time for a spotted trailer, free time will cease immediately at the time the request is made, and detention charges for vehicles with power will immediately commence with no further free time allowed.

(ii) If the change is requested and made after the expiration of free time for a spotted trailer, free time and detention charges will be computed on the basis of a spotted trailer up to the time the change was requested. In addition thereto, the vehicle will immediately be charged detention for a vehicle with power with no further free time allowed.

(c) Prearranged scheduling: (1) Subject to the provisions of item *, and upon reasonable request of consignor, consignee, or others designated by them, carrier will without additional charge enter into a prearranged schedule for the arrival of trailers for spotting.

(2) If carrier's vehicle arrives later than the scheduled time, time shall begin to run from actual time spotting commences.

(3) If carrier's vehicle arrives prior to scheduled time, time shall begin to run from the scheduled time or actual time spotting commences, whichever is earlier.

Section 3. Charges.—(a) General detention charges: After the expiration of free time as provided in section 3(a) of this item, charges for detaining a trailer will be assessed as follows:

	Charge
(1) For each of the first and second 24-hour periods or fraction thereof (Saturdays, Sundays, and holidays excepted).	$25
(2) For each of the third and fourth 24-hour periods or fraction thereof (Saturdays, Sundays, and holidays excepted).	35
(3) For the fifth and each succeeding 24-hour period or fraction thereof (Saturdays, Sundays, and holidays included).	50

(b) Delay in trailer pickup charge: No additional charge will be made for picking up trailers spotted under this item when such pickup can be performed within 30 minutes after arrival of driver and power unit at premises of consignor, consignee, or other party designated by them. When a delay of more than 30 minutes is encountered, detention charges for vehicles with power will commence from the time of arrival as specified in item*.

(c) Strike interference charge: When because of a strike of its employees, it is impossible for consignor, consignee, or other party designated by them to make available for movement by carrier any partially loaded, or empty trailers detained on their premises, a detention charge of $25 per day or fraction thereof, per trailer will be made following expiration of free time. Saturdays, Sundays, and holidays shall be included after the 4th day of charges.

Section 5. Records.—A written record of the following information must be maintained by the carrier on all spotted trailers, and such record must be kept

*Here the carrier is to identify its pertinent rule.

available at all times: (a) Name and address of consignor, consignee, or other party at whose premises the trailer is spotted;

(b) Identification of spotted trailer;

(c) Date and time of arrival of the trailer for spotting;

(d) Date and time notification that the spotted trailer is ready for pickup was received by carrier;

(e) Date and time of arrival and departure of power unit for pickup;

(f) Total actual weight of shipment when pickup is delayed in excess of 30 minutes;

(g) The duration of any strike induced delay on the premises of consignor, consignee, or other designated party which resulted in carrier's inability to obtain the release of any trailer, and any actions taken to hasten the release;

(h) Whether trailers are spotted under a prearranged schedule;

(i) When trailers are spotted under a prearranged schedule, the date and time specified therefor.

NOTE: For the purposes of this item the terms spotting and dropping are considered to be synonymous and are used interchangeably.

APPENDIX VI

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TITLE 49 - TRANSPORTATION
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SUBPART B - COMMON CARRIER FREIGHT TARIFF AND CLASSIFICATION
§1307.35 - TERMINAL AND SPECIAL SERVICES

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 12th day of May 1976.

EX PARTE NO. MC-88

DETENTION OF MOTOR VEHICLES-NATIONWIDE

It appearing, That the Commission, by notice and order dated May 22, 1973, instituted this rulemaking proceeding under authority of part II of the Interstate Commerce Act, 49 U.S.C. 301 *et seq.* (1970), including sections 204(b), 208(a), 216(b) and (d), 217(a), (b), and 222(c), thereof and pursuant to the Administrative Procedure Act, §§4 and 10, 5 U.S.C. §553 and 559 (1970), with the view to adopting the proposed regulations appearing in appendix IV of the accompanying report also filed on this date in order to provide uniform nationwide rules and charges for the detention of motor vehicle;

It further appearing, That by said notice of proposed rulemaking all motor common carriers subject to the Interstate Commerce Act, except those transporting exclusively: (1) household goods, (2) commodities in bulk in tank trucks, (3) heavy and specialized commodities or articles requiring special handling, and (4) articles picked up from or delivered to railroad cars having prior or subsequent transportation by rail, were made respondents, the Commission's Bureau of Enforcement was directed to participate, and any other interested party was invited to participate with regard to the proposed regulations set forth therein; that a copy of the proposed rulemaking was served on each respondent therein, given by mail to the governor of every State having jurisdiction over transportation, deposited in the Office of the Secretary, Interstate Commerce Commission, Washington, D. C. and delivered for publication in the June 29, 1973 issue of the Federal Register (38 F.R. 17254).

It further appearing, That various parties submitted their views and suggestions regarding the proposed rules, and various petitions and replies thereto, and the Commission has considered such representation, and on the date hereof, has made and filed its report containing its findings of fact and conclusion thereon, which report is hereby referred to and made a part hereof.

It is ordered, That the petition to correct of the Southern Motor Carriers Rate Conference, Inc., filed September 12, 1974 be, and it is hereby granted, and that the motion to strike or for clarification of the Drug and Toilet Preparation Traffic Conference, Eastern Industrial Traffic League, Inc and The National Small Shipments Traffic Conference, Inc. be, and it is hereby denied.

It is further ordered. That the Commission hereby adopt the regulations set forth in appendix V of said report;

It is further ordered. That the regulations adopted herein be published in the Federal Register and in the Code of Federal Regulations.

It is further ordered. That the regulations adopted herein shall take effect 60 days after the date of publication in the Federal Register and remain in effect until modified or revoked in whole or in part by further order of the Commission.

And it is further ordered. That notice of this order shall be given to the public by depositing a copy thereof in the Office of the Secretary of the Commission at Washington, D. C.

This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

By the Commission.

ROBERT L. OSWALD.
Secretary.

(SEAL)

124 M.C.C.

Served June 3, 1977

M-12891

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. MC-88

DETENTION OF MOTOR VEHICLES-NATIONWIDE

Decided May 20, 1977

Upon reconsideration, uniform nationwide truckload and volume detention rules including prearranged scheduling and uniform nationwide charges for vehicles with and without power adopted in prior report, 124 M.C.C. 680, modified and affirmed.

Henry J. Bouchat, Terrell C. Clark, S. S. Eisen, Daniel O. Hands, E. Stephen Heisley, Thomas M. Hummer, Alfred G. Krebs, Robert H. Kinker, M. Craig Massey, W. C. Mitchell, John R. Sims, Jr., W. W. Smith, and *Martin A. Weissert* for individual motor carriers.

Robert E. Born, Don R. Devine, Fred G. Favor, John S. Fessenden, Michael Gallagher, Gerald W. Hess, Jon F. Hollengreen, William E. Kenworthy, J. Michael May, John W. McFadden, Jr., Charles Munsch, Z. L. Pearson, Jr., Norman Powell, Warren A. Rawson, J. Alan Royal, J. Anthony Terilla, Edward G. Villalon, and *Joseph A. Wolonsky* for motor carrier associations and rate bureaus.

Jacob P. Billig, J. F. Garriques, H. Richard George, Carl L. Haderer, Terrence D. Jones, David R. Larrouy, William J. Lavelle, John J. C. Martin, Russell A. Mayfield, Frank M. Thoma, John A. Vuono, and *William F. Weh* for individual shippers.

Stanley W. Brown, John M. Cleary, James Bruce Davis, John F. Donelan, Ronald K. Kolins, Wayne E. Lucore, Allan I. Mendelsohn, Doyle G. Owens, Myron Smith, D. C. Teather, and *Charles A. Washer* for shipping associations.

James E. Armstrong and *Dellon E. Coker* for the Department of Defense.

Stephen Z. Adise and *Herbert Alan Dubin* for the International Association of Refrigerated Warehouses, Inc.

REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

This rulemaking proceeding was instituted on our own motion to determine whether uniform nationwide motor vehicle detention

rules and charges were required or warranted. In the prior report and order, 124 M.C.C. 680, decided May 12, 1976, the Commission adopted uniform nationwide truckload and volume detention rules including prearranged scheduling and uniform nationwide charges for vehicles both with and without power.[1] Various parties now seek reconsideration, clarification, or modification of certain portions of the prescribed rules. Replies have been filed.[2] In addition, petitions for leave to intervene were filed by PPG Industries, Inc., Revlon, Inc.,The Colorado Meat Dealers Association, and Jones Dairy Farm. Central States Motor Freight Bureau, Inc., filed a petition for leave to file an amendment to its petition for reconsideration. These petitions for leave to intervene and amend are hereby granted, and the accompaning statements will be accorded consideration. Requests for oral argument were filed by the National Industrial Traffic League and Ford Motor Company. Because the issues in this proceeding have been adequately set forth in the written submissions, the requests for oral argument are hereby denied.

Upon consideration of the matters raised on petition, said petitions for reconsideration, clarification, or modification are hereby granted to the extent shown in this report. All other petitions and requests not specifically referred to herein have been considered and found without merit and are hereby denied. The petitions will be considered within the framework of the five issues raised in the prior report and order. However, because the petitions focus primarily on the application of the adopted rules, rather than on the basic premises underlying the uniform rules and charges, the bulk of the discussion of the petitions will be found below under the heading of "Mechanics of the Adopted Rules."

Issue one.—The need for uniform nationwide rules published in the tariff of all motor common carriers of property subject to the jurisdiction of this Commission.

This principle now seems almost universally accepted by the parties to this proceeding. Only two petitioners, Beaumont Chamber of Commerce and the Local and Short Carriers National Conference, seriously assert that detention rules and charges should be formulated on a local or regional basis. These arguments, which are merely restatements or summaries of the initial statements concerning the concept of uniformity, do not even address our finding in the prior report that the old detention rules were in fact

[1]Appendix I herein sets forth the rules adopted in the prior report. The rules, as modified in this report, and as they will be published in the Federal Register, appear in appendix II.

[2]Petitioners and replicants are listed in appendix III.

largely uniform, except for a myriad of highly specific and inadequately explained individual exceptions. We find insufficient justification in the petitions to retreat from the sound principle of uniformity.

Issue two.—The lawfulness of voluntary prearranged scheduling without prior publication of tariff provisions authorizing such provisions.

Only one petitioner, Middle Atlantic Conference (MAC), takes direct issue with the Commission's conclusion that voluntary prearranged scheduling is lawful without tariff provisions. MAC argues that prearranged scheduling is closely akin to such services as sorting, furnishing helpers, and notification of consignee prior to delivery, all of which have been found to exceed the carriers' line-haul obligation. MAC assert that, because these services require tariff authorization, prearranged scheduling also requires specific authorization. MAC's argument, however, ignores the mutually beneficial aspect of voluntary prearranged scheduling which sets this activity apart from the above listed shipper-benefiting services. This distinction, together with the inherently nondiscriminatory nature of prearranged scheduling, is sufficient to defeat MAC's argument and cause us to affirm our earlier finding on this issue.

Issues three and four.—Mandatory prearranged scheduling for volume and truckload shipments.

Only one petition, that of Commercial Carrier Corporation and Clay Hyder Trucking Lines, Inc., objects to mandatory prearranged scheduling, on the ground that many carriers operate on the basis of pickup and delivery when equipment is available. Petitioners argue that it would be more practical for these carriers to participate in voluntary prearranged scheduling. We conclude that the adopted rule is sufficiently general to take into account this type of situation, and that reversal of our conclusion on this issue is unwarranted.

Issue five.—The level of vehicle detention charges.

The petitions addressing this broad issue fall into six subissues. Three of these subissues, namely the allegations that the present charges are too low, that strike detention charges are too punitive, and that charges higher than an average of present charges are unjustified, can be disposed of by reemphasizing that this proceeding was instituted to establish a uniform charge. We have already concluded that the benefits of uniformity outweigh any minor instances of charges which are not perfectly tuned to the precise needs of all parties to this proceeding. The adopted charges for the most part are fair and balanced, and we reject these attempts to alter

the basic structure of the rules. However, as noted in the prior report,[3] revisions in the level of the uniform detention charge will be considered where there exists clear evidence that carrier costs exceed the detention charge to the extent of effectively eliminating the penalty aspect of that charge. In this regard, the Alaska Carriers Association, Inc. (Alaska Carriers), has argued that a severe hardship would be imposed by the hourly charge of $18 for delays beyond the free-time allowance. It argues that this charge is completely unreasonable in Alaska because the hourly cost for a tractor and driver exceeds $40. Because we realize that transportation conditions and material and labor costs are substantially different in Alaska, a petition from the Alaska Carriers will be entertained to present further evidence on the limited issue of whether a higher charge for delays beyond the free-time allowance should be prescribed for Alaska. Such a petition, if filed, will be handled expeditiously in a separate subproceeding.

Three other subissues generated somewhat more support among the petitioners, one of these, raised primarily by a few shipper petitioners, concerns the fact that the adopted charges are not cost justified. We dispose of this issue by reiterating the key penal nature of detention charges. Because we believe that detention charges must have a penalty element in order to achieve their goal of greater vehicle utilization, we must reject arguments that detention charges be cost justified. Two other subissues concern a system of credit for free time not used, and a provision for periodic revision of the detention charges. With respect to free-time credit, we feel that the adopted charges provide sufficient incentive for more efficient use of motor vehicles. Any marginal gains in incentive value achieved by a system of credits would almost certainly be outweighed by the increased costs of administering a credit system. Regarding annual revisions of the charges, we prefer to retain maximum flexibility in this respect by placing the burden upon the producers and users of transportation to come forward with arguments concerning the level of charges, once those charges have been tested by experience.

MECHANICS OF THE ADOPTED RULES

This brings us to consideration of the numerous issues raised concerning the mechanics of the rule. For ease of handling, those issues which require discussion have been divided into broad classes and labeled as follows: Detention—Vehicles Without Power

[3] 124 M.C.C. at 724-725.

(Spotting), Free Time for Vehicles with Power, Application, Burden of Proof, and Miscellaneous Points. Discussion of these categories will exhaust the issues raised on reconsideration.

Detention—vehicles without power (spotting).—The section of the rules labeled "Spotting Dention—vehicles without power units spotting or dropping of trailers" is by far the most heavily criticized provision in the adopted rules, with 31 of the 44 petitions for reconsideration addressing various aspects of the detention-without-power problem. The criticisms fall into two primary groups—those attacking the definitions of spotting contained in section 2(f) and those seeking alteration of the computation of free time for trailers spotted for loading or unloading contained in section 3. These two issues will be discussed in turn.

The definition of "spotting" contained in section 2(f) and item 33 on page 737 of the prior report and order make it clear that the carriers' line-haul obligation ends when a trailer is dropped in the consignee's/consignor's holding yard. The cost of moving the trailer from the holding yard to the loading/unloading dock is the responsibility of the consignor or consignee. Petitioners Ford Motor Company (Ford), Motor Vehicle Manufacturers Association (MVMA), Revlon, Inc. (Revlon), Proctor & Gamble Company (P&G), and the Drug and Toilet Preparation Traffic Conference (D&TPTC), assert that the adopted definition improperly forces consignees to bear the burden of moving trailers from the holding yards to the unloading docks. Ford's petition, which is echoed or adopted by the other parties objecting to the adopted spotting definition, cites rail demurrage cases for the proposition that motor carriers must deliver to the unloading dock trailers which have first been dropped in a holding yard. Ford further argues that the motor carriers have a "traditional duty" to perform this shuttling service.

These arguments are essentially the same as those advanced in Ford's initial submission in this proceeding, and we see no reason to accept now what was rejected earlier. We emphasize that lower charges for detention without power are based upon the economies which carriers realize by not having drivers and power units tied up in unproductive waiting time. These economies are lost when a carrier must either return a tractor to the yard to shuttle a trailer, or pay an agent to do so. The system advocated by Ford places all of the burden upon the carrier with no attendant balancing economies. Further, we are not persuaded that it is the "traditional duty" of the carrier to perform the shuttle from holding yard to dock. Although it may be "traditional" at Ford plants, the "tradition" is certainly not

universal. Other large shippers maintaining sophisticated holding yards shuttle the trailers themselves at no expense to the carrier. PPG's plant at Mt. Holly Springs, Pa., is an example of such a facility. Because the adopted definition of spotting is sound policy, and because the legal, economic, and policy arguments advanced by Ford and the other petitioners on this issue are unpersuasive, we affirm the definition of "spotting" adopted by the prior report and order.

As noted above, the second group of criticisms focuses on trailer pools. Currently, many motor carriers drop empty trailers in trailer pools located on shippers' premises. The empty trailers, although most commonly used to transport the property of the shipper upon whose premises they rest, may also be used to transport the property of entirely different shippers. The many petitions addressing detention without power stress the operating efficiencies which flow from the use of trailer pools. Generally, the petitions assert that trailer pools reduce deadhead and duplicate mileage by allowing carriers to provide trailers without having to haul them from sometimes distant terminals. Petitioners also claim that trailer pools allow carriers to meet scheduled pickup and delivery times more easily, and to provide efficient service to industries, such as paper mills, located far from established terminals. Irregular-route carriers particularly emphasize that trailer pools allow them to operate efficiently and competitively despite the fact that many do not maintain established terminals. The petitioners emphasize that trailer pools serve the operating convenience of the carriers, and do not exist solely for the benefit of the shippers. The overwhelming majority of petitioners and replicants take the position that the adopted rules would destroy the efficiencies of the mutually beneficial practice of trailer pooling.

The core of this aspect of the controversy over detention without power is the imposition of detention charges 24 hours after a trailer is dropped in the trailer holding area. It is petitioners' position that this provision would at the least impose substantially higher costs upon shippers through increased detention charges, and at worst could end the practice of trailer pooling, or lead to widespread legal and economic evasion of the rule. After careful consideration of the petitions and replies, we conclude that modification of the rule is necessary to achieve efficient transportation service within the objectives of the uniform detention rules.

The problem of detention without power consists of two distinct issues—detention of loaded trailers at their destination, and

detention of empty trailers at the origin of shipments. For convenience, these two issues will be referred to as destination and origin detention. We conclude that the different conditions surrounding the two types of detention require different treatment under the rule. Accordingly, they will be discussed in turn.

Destination detention generally occurs due to factors attributable to the consignee. Assuming that a carrier hauling a loaded trailer arrives at a reasonable time, or at the prearranged time, there should theoretically be no reason to delay unloading the trailer. In an imperfect world, however, reasonable or prompt arrival is not always the case. In addition, a consignee may have inadequate unloading facilities. otherwise adequate facilities may be overburdened with unusual peak-time arrivals, or consignees may have production schedules which call for arriving property to be unloaded directly onto the production line at a particular time. In some cases, a consignee may simply be inefficient and thereby incapable of expeditiously unloading trailers. These factors, and others, combine to create detention of loaded trailers. The common thread is that destination detention is primarily caused by difficulties encountered in the physical unloading of the property, and if these physical barriers were removed there would theoretically be no detention. Because these problems are largely under the consignees' control, the carriers should not be penalized for them. Carriers hauling loaded trailers stand ready, willing, and able to unload them, and would do so but for the physical problems surrounding the unloading process. A carrier derives no benefit from having its trailer stand idle awaiting unloading.

The adopted rule recognizes these facts by imposing detention charges 24 hours after the trailer is dropped in a consignee's holding yard. This rule properly balances the carriers' legitimate need to have trailers expeditiously unloaded with the real problems encountered in unloading trailers at often crowded facilities. Little opposition is expressed by petitioners to the starting of free time when a loaded trailer is dropped in the holding yard. Ford and those few other petitioners who specifically addressed the problem of free-time computations in destination detention endorsed the Commission's formulation. Accordingly, we see no reason to modify the rule with respect to destination detention.

Spotting of trailers for loading presents a sigificantly different set of circumstances. The element of certainty which characterizes unloading is replaced by uncertainty as to the quantity of freight to be loaded, and the time at which it is to be moved. For example,

specialty meat packinghouses, which are representative of all shippers of highly perishable goods, are subject to almost daily rush orders which must be packed and shipped on the day they are received. Uncertainty also exists as to shippers who operate 24 hours a day, 7 days a week. It is the consensus of the parties that it is very efficient to serve these types of shippers with spotted trailers. The uncertainty engendered by shipper needs would only be compounded if trailers must be obtained from distant terminals. This uncertainty can be reduced to the mutual benefit of carrier and shipper by the use of trailer pools. Upon consideration of the more fully developed record now before us, we conclude that modification of the rule with respect to origin detention is necessary.

As noted above, we affirm the definition of spotting contained in section 2(f). However, with respect to section 3, Computation of Free Time, modification is necessary to preserve the benefit of trailer pools. Accordingly section 3 is modified to read as follows:

Section 3: Computation of Free Time.—(a) Commencement of spotting and free time: (1) Spotted trailers will be allowed 24 consecutive hours of free time for loading or unloading. For trailers spotted for unloading, such time shall commence at the time of placement of the trailer at the site designated by consignee, or other party designated by consignee. For trailers spotted for loading, such time shall commence when the trailer is spotted at the site specifically designated by the consignor or a party designated by consignor, or, in the case of an empty trailer placed at the premises of consignor without specific request, at the time a specific request to spot a trailer is received by the carrier. Upon expiration of the 24 hours of free time, detention charges will accrue as provided in section 4.

This modification is intended to allow the continuation of the mutually beneficial practice of trailer pooling. Accordingly, we envision free time beginning to run only at the time a trailer is identified for the use of a shipper, for only then do the benefits of spotting swing most clearly into shipper's favor. It is not our intention to apply detention charges to trailers parked for a carrier's convenience. The exact application of this modified rule will naturally vary from site to site, but the existing practices with respect to trailers spotted for loading can serve as a guide for compliance with the modified rule. This modification is intended to preserve the benefit of trailer pools within the constraints of the policy objectives of a uniform detention rule.

Free time for vehicles with power.—This broad category embraces three subcategories—(1) creation of additional weight brackets in

the free-time table; (2) basing free time on factors other than weight; and (3) the amount of free time allowed, including free time for palletized shipments. These subcategories will be discussed in turn.

(1) Several petitioners argue that increasing use of larger trailers allowing loadings well in excess of 36,000 pounds justifies the creation of an additional weight category for loadings in excess of 44,000 pounds. We agree with petitioners' arguments. Therefore, we will modify the free-time table in section 4 to read:

Actual weight in pounds per vehicle stop (see Note B)	*Free time in minutes per vehicle stop*
Less than 10,000	120
10,000 but less than 20,000	180
20,000 but less than 28,000	240
28,000 but less than 36,000	300
36,000 but less than 44,000	360
44,000 or more	420

(2) Several petitioners request that we base free time on factors other than actual weight. Suggested alternatives include the number of pieces, the billed weight, and combinations of weight and volume. Although these suggestions have merit, we must reject them at this time in the interest of simplicity and ease of application. Our objective is a concise rule subject to as little dispute as possible. We conclude that the actual weight provides the most equitable means of balancing the various factors affecting unloading time, and we, therefore, affirm this portion of the adopted rule.

(3) The Steel Carriers' Tariff Association, Inc. (SCTA), and several other petitioners ask us to modify the adopted rules to provide a maximum of 2 hours' free time on shipments loaded on pallets or on flat-bed or open-top trailers. SCTA makes its request to conform detention charges with the terms of the carriers' latest contract with the Teamsters' Union, which provides that maximum free time for loading and unloading is 2 hours. We find this justification persuasive and modify section 4(b) of the rule by adding at the end of that section the phrase, ", not to exceed 120 minutes."

P&G asks whether its separately developed rules for detention of palletized shipments will be allowed to remain in existence. Because the petitioner's rules appear to conform to the time limits imposed by section 4 of the adopted rules, we do not believe they would conflict with the prescribed rules.

The Great Atlantic & Pacific Tea Company, Inc. (A&P), suggests that carriers be required to charge a lower rate for palletized shipments, or shipments moving on flat-bed or open top trucks,

because of the benefits a carrier reaps from the reduced free time applicable to such shipments. This suggestion goes beyond the scope of this proceeding, for it affects the rates charged for line-haul movements. Inasmuch as this proceeding is directed toward detention rules, we decline to adopt A&P's suggestion at this time.

Prearranged scheduling.—This provision seems to have been fairly well accepted by the parties to this proceeding. Only four petitions seek changes in the mechanics of the application of prearranged scheduling. P&G suggests that in the event of late arrival, a carrier should be required to reschedule delivery for the next working day, without assessment of penalty charges for redelivery. P&G asserts that the present rule allows the carrier to disregard the prearranged scheduling with virtual impunity. Nevertheless, the adopted rules do provide the shipper two options in the case of late delivery. It can request that the vehicle without power remain at its premises subject to the provisions of section 4(d) or it can request that the vehicle with power be returned, and if free time has not expired, no storage or redelivery charge will be assessed. We believe that the rules provide a reasonable alternative to shippers while reducing the opportunities for the granting and receiving of unlawful preferences which might well result from a more liberal rule. We, therefore, conclude that the adopted rule should be tested in actual experience, rather than altered now.

Application.—The petitions addressing this issue seek exclusion or inclusion of various carriers and commodities from the adopted rules. For example, several irregular-route carriers have requested exclusion on the grounds that the adopted rules concerning spotting would severely damage their operations. We conclude that our modification of the spotting rules to allow trailer pools adequately meets this objection, and that, therefore, insufficient reason exists to exclude irregular-route carriers. The same rationale also applies to the petitions from meat haulers and shippers. Many letters were received by the Commission from the manufacturers of certain products, such as store fixtures, carpeting, and appliances, which require extraordinary care in loading so as to prevent damage in transit. These manufacturers, who often utilize specialized, irregular-route carriers and spotted trailers, feared the adopted rules would severely impair their operations. We reply to these expressions of concern by noting that the rules specifically exclude specialized commodities or articles requiring special handling outside the scope of the certificates of general commodities motor carriers. Further, our modification of the spotting rule allows

continuation of the spotting practices relied upon by these manufacturers.

Several rate bureau petitioners have questioned the exclusion of TOFC service, freight forwarders and REA-style service from the adopted rules. Essentially, these petitioners argue that motor carriers will be placed at a competitive disadvantage if other modes are not subjected to the adopted rules. We reject this argument. This proceeding was instituted to resolve real problems surrounding motor carrier detention. Solution of these problems of unjust and unreasonable practices, unjust dicrimination, preference and prejudice, as well as unlawful concessions and rebates, requires the prescription of uniform rules. The long-recognized and inherent differences between the operations of motor carriers and the operations of the excluded modes[4] would require different kinds of rules to accommodate the differences in the operations of the modes.[5] Attempting to formulate these different kinds of rules here would create an unnecessarily complex and cumbersome proceeding without attending balancing practical benefits. Our conclusion on this issue is reinforced by the practical experience with uniform rules gained through prescription in the Middle Atlantic territory. The restriction of the uniform rules to motor carriers in that territory did not result in any undue competitive disadvantage to those motor carriers. Accordingly, we deny the requests to broaden the application of these rules.

Burden of proof.—Four shipper petitioners dispute the adopted rules' shift to the shipper of the burden of proving that the carrier was the cause of any delay past the free time. These petitioners argue the unfairness of requiring them to prove undue delay when they have no real control over the carriers' employees. We are not persuaded to return the burden to the carrier, however. Clearly, detention charges cannot be imposed anytime a vehicle is delayed. But the very nature of the problem precludes a solution totally satisfactory to both shipper and carrier. In affirming the adopted rules in this respect, we stress again that the shipper can enter the time of arrival and completion onto the carriers' detention record, and can also record the duration of nonworking periods. Thus if the carrier is at fault the shipper should be in a position to document this fact. When free time expires and neither party is at fault the carrier's vehicle is nevertheless detained, and the delay should be attributed to the nature of the shipment. Certain types of shipments,

[4] See *Detention of Motor Vehicles—Middle Atl. & New England*, 325 I.C.C. 336, 363 (1965).

[5] See *Maintenance of Records Pertaining to Demurrage*, 352 I.C.C. 739 (1976).

for example, those made up of a large number of packages, may require more time for handling. The keeping of records will serve to reduce delay, and provide a basis from which more accurate judgments of the causes of vehicle detention can be made in the future.

Miscellaneous points.—Jones Transfer Company suggests expanding the definition of "trailer" contained in section 2(a)(1) of the rules governing detention without power to include marine containers used in foreign commerce. Expansion is unnecessary, because the definition as written embraces marine containers. However, to preclude subsequent ambiguities, we modify the definition of "trailer" to read as follows:

Trailer means mobile units *with or without wheels*, used to transport property. [Italicized portion denotes change.]

It should be noted that this definition has application only within the context of motor vehicle detention. Several other petitioners request more exact definitions of the terms "holiday," "normal nonworking periods," and "pallet." We believe the definitions adopted provide adequate clarity. Any further specificity would destroy the rule's desirable simplicity, with no gain in usefulness. We believe that the disputed definition can best be worked out in the light of experience.

Central and Southern Motor Freight Tariff Association, Inc., and Southern Motor Carriers Rate Conference, Inc., have suggested the deletion of open-top equipment from the reduced free time specified in section 4(b) because open-top equipment is often used in lieu of ordinary closed equipment to transport general commodities. For example, a crane-loaded open-top trailer may often be used to transport general commodities on the return trip. We find merit in this suggestion because it will encourage wider and more efficient use of generally less expensive open-top equipment. Accordingly, we modify section 4(b) by adding the following after the words "not to exceed 120 minutes":

except that, when open-top equipment is used in lieu of closed equipment to transport shipments of unpalletized general commodities, free time will be as provided in section 4(a).

The Department of Defense (DOD) seeks clarification of whether prelodging or predelivery of shipping documents in connection with prearranged scheduling is a special service requiring a separate charge and prior tariff publication, or is a natural part of the line-

haul tranportation service, included within the line-haul rate. In the alternative, DOD requests that the Commission consider this issue as a subject for a future, separate proceeding. Because the issues raised by DOD would broaden the issues in this proceeding, those issues should be resolved in a later proceeding. We will, therefore, entertain petitions for a declaratory order on these issues.

FINDINGS

Upon reconsideration, we find that the regulations and charges governing the detention of motor vehicles nationwide, should be amended as shown in this report. We further find that the modified regulations and charges set forth in appendix II to this report are reasonable, lawful, and necessary and should be prescribed as Part 1307.35(e), Chapter X of Title 49 of the Code of Federal Regulations.

An appropriate order will be entered.

APPENDIX I

(Regulations adopted)

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER B - OTHER REGULATIONS RELATING TO TRANSPORTATION
PART 1307 - FREIGHT RATE TARIFFS, SCHEDULES, AND CLASSIFICATIONS OF MOTOR CARRIERS
SUBPART B - COMMON CARRIER FREIGHT TARIFFS AND CLASSIFICATIONS
§1307.35 - TERMINAL AND SPECIAL SERVICES

Amend 49 CFR §1307.35 "terminal and special services," by adding thereto as 1307.35(e) the following:

(e) *Detention of vehicles.*—The following rules apply to all shipments except shipments of household goods; commodities transported in bulk in tank truck, dump trucks, vehicles pneumatically unloaded and other self-unloading mechanized vehicles; heavy and specialized commodities or articles requiring special equipment or handling outside the scope of the certificates of general-commodities motor common carriers; livestock other than ordinary; articles picked up or delivered to railroad care having prior or subsequent transportation by rail; and shipments to consignors and consignees of waterborne commerce at marine terminal facilities to the extent that the marine terminal operator would be liable to the motor common carrier for truck detention under any applicable detention rule promulgated pursuant to the authority of the Federal Maritime Commission.

All common carriers of property by motor vehicle subject to Interstate Commerce Act excepting those specifically excluded, *supra*, shall publish the below rule entitled "Detention-Vehicles With Power Units" and all such carriers engaging in the practice of spotting shall also publish the below rule entitled "Detention-Vehicles Without

Power Units." The wording of the following rules may not be varied except where clearly warranted by exceptional circumstances, and where appropriate, the word "rule" may be substituted for the word "item."

(1) *Detention-vehicles with power units.*—This item applies when carrier's vehicles with power units are delayed or detained on the premises of consignor, consignee, or on other premises designated by them, or as close thereto as conditions will permit, subject to the following provisions:

Section 1. General provisions.—(a) This item applies only to vehicles which have been ordered or used to transport shipments subject to truckload rates. For the purposes of this item, the term truckload rates shall be considered to include shipments moving on a rate subject to a stated minimum weight of 10,000 pounds or more when not designated as a truckload rate, and, where applicable, shipments which are assessed charges based on the provisions of a Capacity Load Rule or are accorded Exclusive Use of Vehicle Service or Expedited Service.

(b) This item applies only when vehicles are delayed or detained at the premises of pickup or delivery and only when such delay or detention is not attributable to the carrier.

(c) Free time for each vehicle will be as provided in section 4. After the expiration of free time, charges will be assessed as provided in section 5.

(d) The detention charges due the carrier will be assessed against the consignor in the case of loading and against the consignee in the case of unloading, irrespective of whether line-haul charges are prepaid or collect. When detention charges are attributable to others who are not parties to the Bill of Lading contract, the charges will be assessed against the shipment. (See Note A.)

(e) When carrier's employee assists in loading, unloading, or checking the freight, this item will apply whether or not the power unit is actually detained.

(f) Nothing in this item shall require a carrier to pick up or deliver freight at hours other than carrier's normal business hours. This shall not be construed to restrict a carrier's ability to accept pickup and delivery schedules at hours other than its normal business hours.

Section 2. Definitions.—The following general definitions will apply when the below terms are used in this item:

(a) "Vehicle" means straight trucks or tractor-trailer combinations used for the transportation of property.

(b) "Loading" includes furnishing carrier with the Bill of Lading, forwarding directions, or other documents necessary for forwarding the shipment.

(c) "Unloading" includes: (1) Surrender of the Bill of Lading to the carrier on shipments billed "To Order."

(2) Payment of lawful charges to the carrier when required prior to delivery of the shipment.

(3) Notification to the carrier that vehicle is unloaded, and

(4) Signing of the delivery receipt.

(d) "Premises" means the entire property at or near the physical facilities of consignor, consignee, or other designated party.

(e) "Site" means a specific location at or on the premises of consignor, consignee, or other designated party.

(f) "Normal nonworking periods" means meal, coffee, and rest breaks.

(g) "Pallet" means pallets, platforms, shipping racks, or skids with or without standing sides or ends, but without tops.

Section 3. Computation of time.—(a) Commencement and termination: (1) The time per vehicle shall begin to run upon actual notification by carrier's employee to a responsible representative of consignor, consignee, or other designated party at the premises of pickup or delivery of the arrival of the vehicle for loading or unloading. Upon such notification, the responsible representative of consignor, consignee, or other designated party may enter the time of arrival onto the carrier's detention record. If the representative refuses to enter the time, then carrier's employee will enter the time and it will be binding upon each party.

(2) Time shall end upon completion of loading or unloading except as provided for in paragraph (c) of this section. Upon such completion, a responsible representative of consignor, consignee, or other designated party may enter the time of completion onto the carrier's detention record. If the representative refuses to enter the time, then carrier's employee will enter the time and it will be binding.

(b) Prearranged scheduling: (1) Subject to the provisions of item *, and upon reasonable request of consignor, consignee, or others designated by them, carrier will without additional charge enter into a prearranged schedule for arrival of the vehicle for loading or unloading.

(2) When the carrier enters into a prearranged schedule with consignor, consignee, or others designated by them for the arrival of the vehicle for loading or unloading and carrier is unable for any reason to maintain such schedule, then carrier and consignor, consignee, or other party designated by them have the option to agree to a mutually convenient and prompt alternative arrival time or in the event such agreement cannot be reached, to compute detention time against consignor, consignee, or other party designated by them from carrier's actual arrival time subject to an extension of 15 minutes for each 15 minutes, or fraction thereof, the vehicle is delayed beyond the originally scheduled arrival time; in no case shall such extended free time exceed 60 minutes.

(3) If carrier's vehicle arrives prior to scheduled time, time shall begin to run from the scheduled time or actual time loading or unloading commences, whichever is earlier.

(c) Conditions governing the computation of time: (1) Computations of time are subject to and are to be made within the normal business hours at the designated place of pickup or delivery. If carrier is permitted to work beyond this period, such working time shall also be included.

(2) When loading or unloading is not completed at the end of normal business hours at the designated place, consignor, consignee, or other party designated by them shall have the option: (i) to request that the vehicle without power remain at its premises subject to the provisions of section 4(d); or

(ii) to request that the vehicle with power be returned to carrier without being subject to charges for storage or redelivery so long as free time has not yet expired. When the vehicle is returned for completion of loading or unloading the computation of any remaining free time will resume. If free time has expired and detention has begun to accrue, storage or redelivery charges as may otherwise be provided will be assessed.

(3) When carrier's employee interrupts loading or unloading by the taking of any normal nonworking periods, any such time will be excluded from the computation of free time, or will be excluded from the computation of time in excess of free time.

Section 4. Free time.—(a) Free time shall be computed as follows:

*Here the carrier is to identify its pertinent rule.

Actual weight in pounds per vehicle stop (see Note B)	*Free time in minutes per vehicle stop*
Less than 10,000	120
10,000 but less than 20,000	180
20,000 but less than 28,000	240
28,000 but less than 36,000	300
36,000 or more	360

(b) When at least 90 percent of the shipment weight (exclusive of pallet weight) is loaded on pallets, or when shipment is loaded on flat-bed or other open-top equipment, free time shall be one-half that amount normally applicable for the weight.

(c) When more than one truckload shipment or a truckload shipment and one or more less-than-truckload (LTL) or any quantity (AQ) shipments are loaded on one vehicle at the premises of consignor or when more than one truckload shipment or a truckload shipment and one or more LTL or AQ shipments are unloaded from one vehicle at the premises of consignee or other designated party, the combined weight will be used to determine free time; in all other instances the individual shipment weight will be used.

(d) When a vehicle with power is changed to a vehicle without power at the request of consignor, consignee, or other party designated by them, the free time and detention charges will be applied as follows: (1) If the change is requested and made before the expiration of free time for a vehicle with power, free time will cease immediately at the time the request is made, and detention charges for vehicles without power will immediately commence with no further free time allowed.

(2) If the change is requested and made after the expiration of free time for a vehicle with power, free time and detention charges will be computed on the basis of a vehicle with power up to the time the change was requested. In addition thereto, the vehicle with power up to the time the change was requested. In addition thereto, the vehicle will immediately be charged detention for vehicles without power with no further free time allowed.

(e) When a vehicle is both unloaded and reloaded, each transaction will be treated independently of the other, except that when loading is begun before unloading i completed, free time for loading shall not begin until free time for unloading ha elapsed.

(f) Loading or unloading at more than one site at or on the premises of consignor, consignee, or other designated party shall constitute one vehicle stop.

Section 5. Charges.—When the delay per vehicle beyond free time is 1 hour or less the charge will be $18. For each additional 30 minutes or fraction thereof, the charge will be $9.

Section 6. Records.—A written record of the following information must be maintained by the carrier on all truckload shipments, and such record must be kept available at all times:

(a) Name and address of consignor, consignee, or other party at whose premises freight is loaded or unloaded;
(b) Identification of vehicle tendered for loading or unloading;
(c) Date and time of notification of arrival of the vehicle for loading or unloading;
(d) Date and time loading or unloading is begun;
(e) Date and time loading or unloading is completed;

(f) Date and time vehicle is released by consignor, consignee, or other party at place of pickup or delivery after loading or unloading is completed;
(g) Actual time of nonworking periods;
(h) Total actual weight of shipment or shipments loaded or unloaded;
(i) Whether articles are tendered under a prearranged schedule for loading or unloading;
(j) Date and time specified for vehicles tendered under a prearranged schedule;
(k) Alternative arrangement made when a vehicle is tendered under a prearranged schedule that was not adhered to.

Note A. At those marine terminal facilities where Federal Maritime Commission detention charges apply, carrier charges pursuant to this rule will be assessed against the shipment to the extent such charges exceed those of the Federal Maritime Commission.

Note B. Also applies to the last vehicle used in transporting overflow truckload shipments, or to vehicles containing truckload shipments stopped for completion of loading or partial unloading.

(2) Detention-vehicles without power units spotting or dropping off trailers (Note).—This item applies when carrier's vehicles without power units are delayed or detained on the premises of consignor, consignee, or on other premises designated by them, or as close thereto as conditions will permit, subject to the following provisions:

Section 1. General provisions.—(a) Subject to the availability of equipment, carrier will spot empty or loaded trailers for loading or unloading on the premises of consignor, consignee, or on other premises designated by them, or as close thereto as conditions will permit.

(b) Loading or unloading will be performed by consignor, consignee, or other party designated by them. When carrier's employee assists in loading, unloading, or checking the freight, the detention provisions governing vehicles with power units will apply. In the case of spotting for loading the Bill of Lading must show "Shipper Load and Count."

(c) Carrier responsibility for safeguarding shipments loaded into trailers spotted under the provisions of this item shall begin when loading has been completed and possession thereof is taken by the carrier.

(d) Carrier responsibility for safeguarding shipments unloaded from trailers spotted under the provisions of this item shall cease when the trailer is spotted at or on the site designated by consignee.

(e) Free time for each vehicle will be as provided in section 3. After the expiration of free time charges will be assessed as provided in section 4.

(f) The detention charges due the carrier will be assessed against the consignor in the case of spotting for loading and against the consignee in the case of spotting for unloading irrespective of whether charges are prepaid or collect.

(g) Nothing in this item shall require a carrier to pickup or deliver spotted trailers at hours other than carrier's normal business hours. This shall not be construed as a restriction on carrier's ability to pick up or deliver spotted trailers at hours other than its normal business hours.

Section 2. Definitions.—The following general definitions will apply when the below terms are used in this item:

(a) "Vehicle" means tractor-trailer combinations used for the transportation of property, where:. (1) "Trailer" means mobile units used to transport property, and
(2) "Tractor" means a mechanically powered unit used to propel or draw a trailer or trailers upon the highways.
(b) "Loading" includes: (1) Furnishing of the Bill of Lading, forwarding directions, or other documents necessary for forwarding the shipment to the carrier, and
(2) Notification to the carrier that the vehicle is loaded and ready for forwarding.
(c) "Unloading" includes: (1) Surrender of the Bill of Lading to the carrier on shipments billed "To Order."
(2) Payment of lawful charges to the carrier when required prior to delivery of the shipment.
(3) Notification to the carrier that vehicle is unloaded and ready for forwarding, and
(4) Signing of delivery receipt.
(d) "Premises" means the entire property at or near the physical facilities of consignor, consignee, or other designated party.
(e) "Site" means a specific location at or on the premises of consignor, consignee, or other designated party.
(f) "Spotting" means the placing of a trailer at a specific site designated by consignor, consignee, or other party designated by them, detaching the trailer, and leaving the trailer in full possession of consignor, consignee, or other designated party unattended by carrier's employee and unaccompanied by power unit. Carrier will not move the trailer until such time as it has received notification, pursuant to section 3, that the trailer is ready for pickup. Consignor, consignee, or other designated party may shift the spotted trailer with its own power units at its own expense and risk for the purpose of loading or unloading.

Section 3: Computation of free time.— (a) Commencement of spotting and free time: (1) Spotted trailers will be allowed 24 consecutive hours of free time for loading or unloading. Such period shall commence at the time of placement of the trailer at the site designated by consignor, consignee, or other party designated by them. Upon the expiration of the 24 hours of free time, detention charges will accrue as provided in section 4.
(2) When any portion of the 24-hour free time extends into a Saturday, Sunday, or holiday (national, State, or municipal), the computation of time for such portion shall resume at 12:01 a.m. on the next day which is neither a Saturday, Sunday, or holiday.
(3) Free time shall not begin on a Saturday, Sunday, or holiday (national, State or municipal), but at 8 a.m. on the next day which is neither a Saturday, Sunday, or holiday.
(4) When a trailer is both unloaded and reloaded, each transaction will be treated independently of the other, except that when unloading is completed, free time for loading shall not begin until free time for unloading has elapsed.

(b) Termination of spotting and notification: (1) Consignor, consignee, or other party designated by them shall notify carrier when loading or unloading has been completed and the trailer is available for pickup. The trailer will be deemed to be spotted and detention charges will accrue until such time as the receives notificati n. Notification by telephone if convenient and practical, otherwise by telegraph or mail shall be given by consignor, consignee, or other party designated by them at their own expense, to carrier or other party designated by carrier for the purpose of advising such carrier or other party that the spotted trailer has been loaded or unloaded and is

ready for pickup. If notification is by telephone, carrier may require written confirmation.
(2) When a spotted trailer is changed to a vehicle with power at the request of consignor, consignee, or other party designated by them, the free time and detention charges will be applied as follows:
(i) If the change is requested and made before the expiration of free time for a spotted trailer, free time will cease immediately at the time the request is made, and detention charges for vehicles with power will immediately commence with no further free time allowed.
(ii) If the change is requested and made after the expiration of free time for a spotted trailer, free time and detention charges will be computed on the basis of a spotted trailer up to the time the change was requested. In addition thereto, the vehicle will immediately be charged detention for a vehicle with power with no further free time allowed.
(c) Prearranged scheduling: (1) Subject to the provisions of item *, and upon reasonable request of consignor, consignee, or others designated by them, carrier will without additional charge enter into a prearranged schedule for the arrival of trailers for spotting.
(2) If carrier's vehicle arrives later than the scheduled time, time shall begin to run from actual time spotting commences.
(3) If carrier's vehicle arrives prior to scheduled time, time shall begin to run from the scheduled time or actual time spotting commences, whichever is earlier.
Section 4. Charges.—(a) General detention charges: After the expiration of free time as provided in section 3(a) of this item, charges for detaining a trailer will be assessed as follows:

	Charge
(1) For each of the first and second 24-hour periods or fraction thereof (Saturdays, Sundays, and holidays excepted).	$25
(2) For each of the third and fourth 24-hour periods or fraction thereof (Saturdays, Sundays, and holidays excepted).	35
(3) For the fifth and each succeeding 24-hour period or fraction thereof (Saturdays, Sundays, and holidays included).	50

(b) Delay in trailer pickup charge: No additional charge will be made for picking up trailers spotted under this item when such pickup can be performed within 30 minutes after arrival of driver and power unit at premises of consignor, consignee, or other party designated by them. When a delay of more than 30 minutes is encountered, detention charges for vehicles with power will commence from the time of arrival as specified in item*.
(c) Strike interference charge: When because of a strike of its employees, it is impossible for consignor, consignee, or other party designated by them to make available for movement by carrier any partially loaded, or empty trailers detained on their premises, a detention charge of $25 per day or fraction thereof, per trailer will be made following expiration of free time. Saturdays, Sundays, and holidays shall be included after the 4th day of charges.
Section 5. Records.—A written record of the following information must be maintained by the carrier on all spotted trailers, and such record must be kept

*Here the carrier is to identify its pertinent rule.

available at all times: (a) Name and address of consignor, consignee, or other party at whose premises the trailer is spotted;

(b) Identification of spotted trailer;

(c) Date and time of arrival of the trailer for spotting;

(d) Date and time notification that the spotted trailer is ready for pickup was received by carrier;

(e) Date and time of arrival and departure of power unit for pickup;

(f) Total actual weight of shipment when pickup is delayed in excess of 30 minutes;

(g) The duration of any strike induced delay on the premises of consignor, consignee, or other designated party which resulted in carrier's inability to obtain the release of any trailer, and any actions taken to hasten the release;

(h) Whether trailers are spotted under a prearranged schedule;

(i) When trailers are spotted under a prearranged schedule, the date and time specified therefor.

NOTE: For the purposes of this item the terms spotting and dropping are considered to be synonymous and are used interchangeably.

APPENDIX II

(Modified regulations)

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER B - OTHER REGULATIONS RELATING TO TRANSPORTATION
PART 1307 - FREIGHT RATE TARIFFS, SCHEDULES, AND CLASSIFICATIONS OF MOTOR CARRIERS
SUBPART B - COMMON CARRIER FREIGHT TARIFFS AND CLASSIFICATIONS
§1307.35 - TERMINAL AND SPECIAL SERVICES

Amend 49 CFR §1307.35 "terminal and special services," by adding thereto as 1307.35(e) the following:

(e) *Detention of vehicles.*—The following rules apply to all shipments except shipments of household goods; commodities transported in bulk in tank truck, dump trucks, vehicles pneumatically unloaded and other self-unloading mechanized vehicles; heavy and specialized commodities or articles requiring special equipment or handling outside the scope of the certificates of general-commodities motor common carriers; livestock other than ordinary; articles picked up or delivered to railroad care having prior or subsequent transportation by rail; and shipments to consignors and consignees of waterborne commerce at marine terminal facilities to the extent that the marine terminal operator would be liable to the motor common carrier for truck detention under any applicable detention rule promulgated pursuant to the authority of the Federal Maritime Commission.

All common carriers of property by motor vehicle subject to Interstate Commerce Act excepting those specifically excluded, *supra*, shall publish the below rule entitled "Detention-Vehicles With Power Units" and all such carriers engaging in the practice of spotting shall also publish the below rule entitled "Detention-Vehicles Without

Power Units." The wording of the following rules may not be varied except where clearly warranted by exceptional circumstances, and where appropriate, the word "rule" may be substituted for the word "item."

(1) *Detention-vehicles with power units.*—This item applies when carrier's vehicles with power units are delayed or detained on the premises of consignor, consignee, or on other premises designated by them, or as close thereto as conditions will permit, subject to the following provisions:

Section 1. General provisions.—(a) This item applies only to vehicles which have been ordered or used to transport shipments subject to truckload rates. For the purposes of this item, the term truckload rates shall be considered to include shipments moving on a rate subject to a stated minimum weight of 10,000 pounds or more when not designated as a truckload rate, and, where applicable, shipments which are assessed charges based on the provisions of a Capacity Load Rule or are accorded Exclusive Use of Vehicle Service or Expedited Service.

(b) This item applies only when vehicles are delayed or detained at the premises of pickup or delivery and only when such delay or detention is not attributable to the carrier.

(c) Free time for each vehicle will be as provided in section 4. After the expiration of free time, charges will be assessed as provided in section 5.

(d) The detention charges due the carrier will be assessed against the consignor in the case of loading and against the consignee in the case of unloading, irrespective of whether line-haul charges are prepaid or collect. When detention charges are attributable to others who are not parties to the Bill of Lading contract, the charges will be assessed against the shipment. (See Note A.)

(e) When carrier's employee assists in loading, unloading, or checking the freight, this item will apply whether or not the power unit is actually detained.

(f) Nothing in this item shall require a carrier to pick up or deliver freight at hours other than carrier's normal business hours. This shall not be construed to restrict a carrier's ability to accept pickup and delivery schedules at hours other than its normal business hours.

Section 2. Definitions.—The following general definitions will apply when the below terms are used in this item:

(a) "Vehicle" means straight trucks or tractor-trailer combinations used for the transportation of property.

(b) "Loading" includes furnishing carrier with the Bill of Lading, forwarding directions, or other documents necessary for forwarding the shipment.

(c) "Unloading" includes: (1) Surrender of the Bill of Lading to the carrier on shipments billed "To Order,"

(2) Payment of lawful charges to the carrier when required prior to delivery of the shipment,

(3) Notification to the carrier that vehicle is unloaded, and

(4) Signing of the delivery receipt.

(d) "Premises" means the entire property at or near the physical facilities of consignor, consignee, or other designated party.

(e) "Site" means a specific location at or on the premises of consignor, consignee, or other designated party.

(f) "Normal nonworking periods" means meal, coffee, and rest breaks.

(g) "Pallet" means pallets, platforms, shipping racks, or skids with or without standing sides or ends, but without tops.

Section 3. Computation of time.—(a) Commencement and termination: (1) The time per vehicle shall begin to run upon actual notification by carrier's employee to a responsible representative of consignor, consignee, or other designated party at the premises of pickup or delivery of the arrival of the vehicle for loading or unloading. Upon such notification, the responsible representative of consignor, consignee, or other designated party may enter the time of arrival onto the carrier's detention record. If the representative refuses to enter the time, then carrier's employee will enter the time and it will be binding upon each party.

(2) Time shall end upon completion of loading or unloading except as provided for in paragraph (c) of this section. Upon such completion, a responsible representative of consignor, consignee, or other designated party may enter the time of completion onto the carrier's detention record. If the representative refuses to enter the time, then carrier's employee will enter the time and it will be binding.

(b) Prearranged scheduling: (1) Subject to the provisions of item *, and upon reasonable request of consignor, consignee, or others designated by them, carrier will without additional charge enter into a prearranged schedule for arrival of the vehicle for loading or unloading.

(2) When the carrier enters into a prearranged schedule with consignor, consignee, or others designated by them for the arrival of the vehicle for loading or unloading and carrier is unable for any reason to maintain such schedule, then carrier and consignor, consignee, or other party designated by them have the option to agree to a mutually convenient and prompt alternative arrival time or in the event such agreement cannot be reached, to compute detention time against consignor, consignee, or other party designated by them from carrier's actual arrival time subject to an extension of 15 minutes for each 15 minutes, or fraction thereof, the vehicle is delayed beyond the originally scheduled arrival time; in no case shall such extended free time exceed 60 minutes.

(3) If carrier's vehicle arrives prior to scheduled time, time shall begin to run from the scheduled time or actual time loading or unloading commences, whichever is earlier.

(c) Conditions governing the computation of time: (1) Computations of time are subject to and are to be made within the normal business hours at the designated place of pickup or delivery. If carrier is permitted to work beyond this period, such working time shall also be included.

(2) When loading or unloading is not completed at the end of normal business hours at the designated place, consignor, consignee, or other party designated by them shall have the option: (i) to request that the vehicle without power remain at its premises subject to the provisions of section 4(d); or

(ii) to request that the vehicle with power be returned to carrier without being subject to charges for storage or redelivery so long as free time has not yet expired. When the vehicle is returned for completion of loading or unloading the computation of any remaining free time will resume. If free time has expired and detention has begun to accrue, storage or redelivery charges as may otherwise be provided will be assessed.

(3) When carrier's employee interrupts loading or unloading by the taking of any normal nonworking periods, any such time will be excluded from the computation of free time, or will be excluded from the computation of time in excess of free time.

Section 4. Free time.—(a) Free time shall be computed as follows:

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*Here the carrier is to identify its pertinent rule.

Actual weight in pounds per vehicle stop (see Note B)	*Free time in minutes per vehicle stop*
Less than 10,000	120
10,000 but less than 20,000	180
20,000 but less than 28,000	240
28,000 but less than 36,000	300
36,000 but less than 44,000	360
44,000 or more	420

(b) When at least 90 percent of the shipment weight (exclusive of pallet weight) is loaded on pallets, or when shipment is loaded on flat-bed or other open-top equipment, free time shall be one-half that amount normally applicable for the weight, not to exceed 120 minutes, except that, when open-top equipment is used in lieu of closed equipment to transport shipments of unpalletized general commodities, free time will be as provided in section 4(a).

(c) When more than one truckload shipment or a truckload shipment and one or more less-than-truckload (LTL) or any quantity (AQ) shipments are loaded on one vehicle at the premises of consignor or when more than one truckload shipment or a truckload shipment and one or more LTL or AQ shipments are unloaded from one vehicle at the premises of consignee or other designated party, the combined weight will be used to determine free time; in all other instances the individual shipment weight will be used.

(d) When a vehicle with power is changed to a vehicle without power at the request of consignor, consignee, or other party designated by them, the free time and detention charges will be applied as follows: (1) If the change is requested and made before the expiration of free time for a vehicle with power, free time will cease immediately at the time the request is made, and detention charges for vehicles without power will immediately commence with no further free time allowed.

(2) If the change is requested and made after the expiration of free time for a vehicle with power, free time and detention charges will be computed on the basis of a vehicle with power up to the time the change was requested. In addition thereto, the vehicle will immediately be charged detention for vehicles without power with no further free time allowed.

(e) When a vehicle is both unloaded and reloaded, each transaction will be treated independently of the other, except that when loading is begun before unloading is completed, free time for loading shall not begin until free time for unloading has elapsed.

(f) Loading or unloading at more than one site at or on the premises of consignor, consignee, or other designated party shall constitute one vehicle stop.

Section 5. Charges.—When the delay per vehicle beyond free time is 1 hour or less the charge will be $18. For each additional 30 minutes or fraction thereof, the charge will be $9.

Section 6. Records.—A written record of the following information must be maintained by the carrier on all truckload shipments, and such record must be kept available at all times:

(a) Name and address of consignor, consignee, or other party at whose premises freight is loaded or unloaded;

(b) Identification of vehicle tendered for loading or unloading;
(c) Date and time of notification of arrival of the vehicle for loading or unloading;
(d) Date and time loading or unloading is begun;
(e) Date and time loading or unloading is completed;
(f) Date and time vehicle is released by consignor, consignee, or other party at place of pickup or delivery after loading or unloading is completed;
(g) Actual time of nonworking periods;
(h) Total actual weight of shipment or shipments loaded or unloaded;
(i) Whether articles are tendered under a prearranged schedule for loading or unloading;
(j) Date and time specified for vehicles tendered under a prearranged schedule;
(k) Alternative arrangement made when a vehicle is tendered under a prearranged schedule that was not adhered to.

Note A. At those marine terminal facilities where Federal Maritime Commission detention charges apply, carrier charges pursuant to this rule will be assessed against the shipment to the extent such charges exceed those of the Federal Maritime Commission.

Note B. Also applies to the last vehicle used in transporting overflow truckload shipments, or to vehicles containing truckload shipments stopped for completion of loading or partial unloading.

(2) Detention-vehicles without power units spotting or dropping of trailers (Note).—This item applies when carrier's vehicles without power units are delayed or detained on the premises of consignor, consignee, or on other premises designated by them, or as close thereto as conditions will permit, subject to the following provisions:

Section 1. General provisions.—(a) Subject to the availability of equipment, carrier will spot empty or loaded trailers for loading or unloading on the premises of consignor, consignee, or on other premises designated by them, or as close thereto as conditions will permit.

(b) Loading or unloading will be performed by consignor, consignee, or other party designated by them. When carrier's employee assists in loading, unloading, or checking the freight, the detention provisions governing vehicles with power units will apply. In the case of spotting for loading the Bill of Lading must show "Shipper Load and Count."

(c) Carrier responsibility for safeguarding shipments loaded into trailers spotted under the provisions of this item shall begin when loading has been completed and possession thereof is taken by the carrier.

(d) Carrier responsibility for safeguarding shipments unloaded from trailers spotted under the provisions of this item shall cease when the trailer is spotted at or on the site designated by consignee.

(e) Free time for each vehicle will be as provided in section 3. After the expiration of free time charges will be assessed as provided in section 4.

(f) The detention charges due the carrier will be assessed against the consignor in the case of spotting for loading and against the consignee in the case of spotting for unloading irrespective of whether charges are prepaid or collect.

(g) Nothing in this item shall require a carrier to pickup or deliver spotted trailers at hours other than carrier's normal business hours. This shall not be construed as a restriction on carrier's ability to pick up or deliver spotted trailers at hours other than its normal business hours.

Section 2. Definitions.—The following general definitions will apply when the below terms are used in this item:

(a) "Vehicle" means tractor-trailer combinations used for the transportation of property where: (1) "Trailer" means mobile units with or without wheels, used to transport property and,

(2) "Tractor" means a mechanically powered unit used to propel or draw a trailer or trailers upon the highways.

(b) "Loading" includes: (1) Furnishing of the Bill of Lading, forwarding directions, or other documents necessary for forwarding the shipment to the carrier, and

(2) Notification to the carrier that the vehicle is loaded and ready for forwarding.

(c) "Unloading" includes: (1) Surrender of the Bill of Lading to the carrier on shipments billed "To Order."

(2) Payment of lawful charges to the carrier when required prior to delivery of the shipment.

(3) Notification to the carrier that vehicle is unloaded and ready for forwarding, and

(4) Signing of delivery receipt.

(d) "Premises" means the entire property at or near the physical facilities of consignor, consignee, or other designated party.

(e) "Site" means a specific location at or on the premises of consignor, consignee, or other designated party.

(f) "Spotting" means the placing of a trailer at a specific site designated by consignor, consignee, or other party designated by them, detaching the trailer, and leaving the trailer in full possession of consignor, consignee, or other designated party unattended by carrier's employee and unaccompanied by power unit. Carrier will not move the trailer until such time as it has received notification, pursuant to section 3, that the trailer is ready for pickup. Consignor, consignee, or other designated party may shift the spotted trailer with its own power units at its own expense and risk for the purpose of loading or unloading.

Section 3. Computation of free time.—(a) Commencement of spotting and free time: (1) Spotted trailers will be allowed 24 consecutive hours of free time for loading or unloading. For trailers spotted for unloading, such time shall commence at the time of placement of the trailer at the site designated by consignee, or other party designated by consignee. For trailers spotted for loading, such time shall commence when the trailer is spotted at the site specifically designated by the consignor or a party designated by consignor, or, in the case of an empty trailer placed at the premises of consignor without specific request, at the time a specific request to spot a trailer is received by the carrier. Upon the expiration of the 24 hours of free time, detention charges will accrue as provided in section 4.

(2) When any portion of the 24-hour free time extends into a Saturday, Sunday, or holiday (national, State, or municipal), the computation of time for such portion shall resume at 12:01 a.m. on the next day which is neither a Saturday, Sunday, or holiday.

(3) Free time shall not begin on a Saturday, Sunday, or holiday (national, State, or municipal), but at 8 a.m. on the next day which is neither a Saturday, Sunday, or holiday.

(4) When a trailer is both unloaded and reloaded, each transaction will be treated independently of the other, except that when loading is begun before unloading is completed, free time for loading shall not begin until free time for unloading has elapsed.

(b) Termination of spotting and notification: (1) Consignor, consignee, or other party designated by them shall notify carrier when loading or unloading has been completed and the trailer is available for pickup. The trailer will be deemed to be spotted and detention charges will accrue until such time as the carrier receives notification. Notification by telephone if convenient and practical, otherwise by telegraph or mail shall be given by consignor, consignee, or other party designated by them at their own expense, to carrier or other party designated by carrier for the purpose of advising such carrier or other party that the spotted trailer has been loaded or unloaded and is ready for pickup. If notification is by telephone, carrier may require written confirmation.

(2) When a spotted trailer is changed to a vehicle with power at the request of consignor, consignee, or other party designated by them, the free time and detention charges will be applied as follows:

(i) If the change is requested and made before the expiration of free time for a spotted trailer, free time will cease immediately at the time the request is made, and detention charges for vehicles with power will immediately commence with no further free time allowed.

(ii) If the change is requested and made after the expiration of free time for a spotted trailer, free time and detention charges will be computed on the basis of a spotted trailer up to the time the change was requested. In addition thereto, the vehicle will immediately be charged detention for a vehicle with power with no further free time allowed.

(c) Prearranged scheduling: (1) Subject to the provisions of item *, and upon reasonable request of consignor, consignee, or others designated by them, carrier will without additional charge enter into a prearranged schedule for the arrival of trailers for spotting.

(2) If carrier's vehicle arrives later than the scheduled time, time shall begin to run from actual time spotting commences.

(3) If carrier's vehicle arrives prior to scheduled time, time shall begin to run from the scheduled time or actual time spotting commences, whichever is earlier.

Section 4. Charges.—(a) General detention charges: After the expiration of free time as provided in section 3(a) of this item, charges for detaining a trailer will be assessed as follows:

	Charge
(1) For each of the first and second 24-hour periods or fraction thereof (Saturdays, Sundays, and holidays excepted).	$25
(2) For each of the third and fourth 24-hour periods or fraction thereof (Saturdays, Sundays, and holidays excepted).	35
(3) For the fifth and each succeeding 24-hour period or fraction thereof (Saturdays, Sundays, and holidays included).	50

(b) Delay in trailer pickup charge: No additional charge will be made for picking up trailers spotted under this item when such pickup can be performed within 30 minutes after arrival of driver and power unit at premises of consignor, consignee, or other party designated by them. When a delay of more than 30 minutes is encountered, detention charges for vehicles with power will commence from the time of arrival as specified in item*.

*Here the carrier is to identify its pertinent rule.

(c) Strike interference charge: When because of a strike of its employees, it is impossible for consignor, consignee, or other party designated by them to make available for movement by carrier any partially loaded, or empty trailers detained on their premises, a detention charge of $25 per day or fraction thereof, per trailer will be made following expiration of free time. Saturdays, Sundays, and holidays shall be included after the 4th day of charges.

Section 5. Records.—A written record of the following information must be maintained by the carrier on all spotted trailers, and such record must be kept available at all times: (a) Name and address of consignor, consignee, or other party at whose premises the trailer is spotted;

(b) Identification of spotted trailer;

(c) Date and time of arrival of the trailer for spotting;

(d) Date and time notification that the spotted trailer is ready for pickup was received by carrier;

(e) Date and time of arrival and departure of power unit for pickup;

(f) Total actual weight of shipment when pickup is delayed in excess of 30 minutes;

(g) The duration of any strike induced delay on the premises of consignor, consignee, or other designated party which resulted in carrier's inability to obtain the release of any trailer, and any actions taken to hasten the release.

(h) Whether trailers are spotted under a prearranged schedule;

(i) When trailers are spotted under a prearranged schedule, the date and time specified therefor.

NOTE: For the purposes of this item the terms spotting and dropping are considered to be synonymous and are used interchangeably.

APPENDIX III

List of petitioners and replicants on reconsideration

PETITIONERS

I. *Motor carriers:*
Victor Transit Corporation
Virginia-Carolina Freight Lines, Inc.
Frozen Food Express, Inc.
North American Van Lines, Inc.
Pacific Intermountain Express Company
Mural Transport, Inc.
Jones Transfer Company[1]
Central Transport, Inc., Coldway Food Express, Inc., Colonial Refrigerated Transportation, Inc., Colonial Fast Freight Lines, Inc., Fredonia Express, Inc., Riggs Food Express, Inc., Subler Transfer, Inc., and Henry Zellmer (a joint statement)
Blue Ridge Transfer Co., Byrd Motor Line, Inc., Dietz Motor Lines, Inc., Ray Widener Motor Lines, Inc., and Sharpe Motor Lines (a joint statement)
Commercial Carrier Corporation and Clay Hyder Trucking Lines, Inc. (a joint statement)
Michigan & Nebraska Transit Co., Inc.
The Davidson Transfer & Storage Company

II. *Motor carrier associations and rate bureaus:*
Southern Motor Carriers Rate Conference, Inc.[1]
Rocky Mountain Motor Tariff Bureau, Inc.[1]
Middle Atlantic Conference[1]
Steel Carriers' Tariff Association, Inc.[1]
Central & Southern Motor Freight Tariff Association, Inc.[1]
Local and Short Haul Carriers Rate Conference, Inc.
The New England Motor Rate Bureau, Inc.
Central States Motor Freight Bureau, Inc.[1]
Common Carrier Conference—Irregular Route
The Eastern Central Motor Carriers Association, Inc.
Alaska Carriers Association, Inc.

III. *Shippers*
Swift & Company and Derby Foods, Inc.
The Great Atlantic & Pacific Tea Company, Inc.
The Nestle Co., Inc.
Geo. A. Hormel & Co., Oscar Mayer & Co., John Morrell & Co., and the Rath Packing Company (a joint statement)
Ford Motor Company
Proctor & Gamble Company
PPG Industries, Inc.
Acme Markets, Inc.
Revlon, Inc.
Jones Dairy Farm

IV. *Shipping associations*
Motor Vehicle Manufacturers Association of the United States, Inc.
National Association of Food Chains
Beaumont Chamber of Commerce
American Retail Federation
The Colorado Meat Dealers Association
Eastern Industrial Traffic League, Inc.
Drug and Toilet Preparation Traffic Conference, Eastern Industrial Traffic League, Inc., and the National Small Shipments Traffic Conference, Inc.[1]
National Industrial Traffic League[1]

V. *Governmental interests*
Department of Defense

VI. *Other interests*
International Association of Refrigerated Warehouses, Inc.

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[1]These parties also filed replies to the petitions for reconsideration filed by other parties. In addition, replies were filed by the following parties who did not file petitions for reconsideration: National Independent Truckers Unity Council, Canned Goods Shippers Conference, American Frozen Food Institute, and Middlewest Motor Freight Bureau.

ORDER

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER B - OTHER REGULATIONS RELATING TO TRANSPORTATION
PART 1307 - FREIGHT RATE TARIFFS, SCHEDULES, AND CLASSIFICATIONS OF MOTOR CARRIERS
SUBPART B - COMMON CARRIER FREIGHT TARIFF AND CLASSIFICATION
§1307.35 - TERMINAL AND SPECIAL SERVICES

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 20th day of May 1977.

EX PARTE NO. MC-88

DETENTION OF MOTOR VEHICLES-NATIONWIDE

Upon consideration of the record in this proceeding, including the report and order of the Commission, 124 M.C.C. 680, decided May 12, 1976, prescribing uniform nationwide rules and charges for the detention of motor vehicles, which were published as new section 1307.35(e), of Subpart B, Part 1307, Subchapter B, Chapter X, of Title 49 of the Code of Federal Regulations; and petitions for reconsideration and replies thereto filed by the parties listed in appendix III to the accompanying report; and

It appearing, That petitions for leave to intervene were filed by PPG Industries, Inc., Revlon, Inc., The Colorado Meat Dealers Association, and Jones Dairy Farm;

And it further appearing, That requests for oral argument were filed by the National Industrial Traffic League and Ford Motor Company, but that all of the issues in this proceeding have been adequately set forth in the written submissions;

Wherefore, and good cause appearing therefor:

It is ordered, That the said petitions for reconsideration be, and they are hereby, granted;

It is further ordered, That the said petitions for intervention be, and they are hereby, granted;

It is further ordered, That the requests for oral argument be, and they are hereby, denied, for the reason that insufficient reason has been shown to grant the requests;

It is further ordered, That the rules previously prescribed in the Commission's report and order, 124 M.C.C. 680, be, and they are hereby, modified to read as set forth in appendix II to the accompanying report and order of the Commission on reconsideration decided on this date.

It is further ordered, That the prescribed rules, as modified, shall be published in the Federal Register;

It is further ordered, That respondents comply with the modified prescribed rules within 90 days after the date of publication in the Federal Register;

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the Office of the Secretary of the Interstate Commerce Commission, at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register, for publication in the Federal Register.

By the Commission.

ROBERT L. OSWALD.
Secretary.

(SEAL)

126 M.C.C.

Interstate Commerce Commission

DECISION AND ORDER

EX PARTE NO. MC-88

DETENTION OF MOTOR VEHICLES — NATIONWIDE

Petitions for reconsideration, modification and reopening of the Commission's report and order, served June 3, 1977 (126 M.C.C. 803), have been filed by the following parties: Jones Transfer Company, The Cleveland, Columbus and Cincinnati Highway, Inc., Central Transport, Inc. and Inter-City Trucking Service, Inc., Motor Express, Inc., Ford Motor Company, Maiers Motor Freight Company, et al., Motor Express Inc. of Indiana, The National Industrial Traffic League, and Blue Arrow-Douglas, Inc. Replies have been filed by Central and Southern Motor Freight Tariff Association, Inc., Middle Atlantic Conference, and Southern Motor Carriers Rate Conference, Inc. Petitioners seek modification, reconsideration or reopening of the prescribed uniform detention rules concerning spotting of vehicles, the burden of proving the cause of detention, the level of the prescribed uniform detention charges, the amount of free time allowed for detention of vehicles with power, and the applicability of the prescribed uniform rules. Petitions also seek clarification of certain portions of the prescribed rules. Ford Motor Company (Ford) petitioned for oral argument.

Two issues concerning spotting of vehicles have been raised. The first concerns an alleged ambiguity in the rule, while the second relates to the effect of the rule. Regarding the first issue, petitioners assert that the definition of spotting in section 2(f) of the rules governing detention without power is inconsistent with section 3, of the rules governing detention without power, computation of free time, and the

explanation of section 3 contained in the text of the Commission's report on reconsideration. Petitioners claim that ambiguity exists as to whether the carrier or the shipper has the burden of moving an empty trailer from a holding area to the loading site.

We do not agree. Spotting means placing, detaching, and leaving a trailer in the full possession of consignor or consignee at a specific site designated by them. Loaded or empty trailers ordered into a holding area, or placed directly at the loading or unloading site, are spotted when the trailer is first placed, detached, and left. If a carrier leaves a trailer in a holding area without specific request, section 3(1) provides that it is spotted when the carrier receives the request to spot the trailer. Section 2(f), which prohibits subsequent carrier movement of spotted trailers, only applies after a trailer is spotted. Technically, an empty trailer left in a holding area without specific request is not spotted because it has not been left at a site specifically designated by consignor. Nor has it been left in full possession of consignor, because the carrier is free to move or even remove the trailer altogether. Therefore, the rules manifestly give the carrier the responsibility for moving trailers left without specific request to the loading site. In contrast, loaded trailers ordered into a holding area fall within the spotting definition of section 2(f). Further, that section's prohibition of subsequent carrier movement of spotted trailers places the responsibility for moving such trailers upon the consignee.

Nevertheless, in the interest of maximum clarity, section 2(f) of the rules governing detention without power is modified as follows.

(1) At the end of the second sentence, add:

at any site on premises.

(2) Following the last sentence, add:

Empty trailers placed at the premises of consignor without specific request are not spotted until the carrier receives a consignor's request and places a trailer for spotting. Movement of the trailer from the consignor's premises to the specific site for spotting shall be the obligation of the carrier, and free time shall accrue as provided in section 3.

We also conclude that more consistent application of the rules for detention of vehicles without power can be achieved by beginning free time in all cases when the trailer is actually spotted. Accordingly, in section 3(1), of the rules governing detention without power the following language (also shown on page 810 of the report on reconsideration) is deleted.

> . . . or, in the case of an empty trailer placed at the premises of consignor without specific request, at the time a specific request to spot a trailer is received by the carrier.

Regarding the text of the report on reconsideration, we recognize that ambiguity could be created by the language appearing on page 807. Our intention was to treat origin and destination trailer pools differently. The language on page 810 expresses a desire to preserve and continue the benefits of origin trailer pools. Existing practices were cited as guidelines for complying with the modified rule. The rules themselves make it clear that carriers are responsible for moving empty trailers left in a holding area without specific request from those areas to the loading site, at which time they are considered to be spotted. Our language at page 807 was intended to discuss and dispose of objections to the requirement in section 2(f) tjat consignees shuttle spotted loaded trailers from destination holding yards to unloading sites. The language used was broader than necessary to accomplish this task. To remove any ambiguity, the first two sentences of the second full paragraph

on page 807 of the report on reconsideration are clarified to read as follows:

> The definition of 'spotting" contained in section 2(f) and item 33 on page 737 of the prior report and order make it clear that the carriers' line-haul obligation ends when a loaded trailer is dropped in the consignee's holding yard. The cost of moving the trailer from the holding yard to the unloading dock is the responsibility of the consignee.

The second issue concerning detention of vehicles without power concerns the impact of the adopted rules on shippers making extensive use of holding yards. In essence, petitioners repeat arguments that are no more persuasive now than they were earlier. We reject assertions that the destination holding yards or "bullpens" are primarily for the carriers' benefit. The description of inbound operations in Ford's petition for modification demonstrates the extent to which Ford unduly benefits from having loaded trailers immediately available at anytime with little or no advance planning. Petitioners stress the economies of bullpens as justification for imposing the responsibility for shuttling trailers on the carriers. This argument ignores the fact that the convenient holding yard arrangement advocated by petitioners allows large shippers the advantage of unlimited spotting with little or no likelihood of incurring any detention charges. Their operations clearly do not fall within the definition of spotting and the advantage accrues particularly to large and relatively inefficient shippers.

Petitioners assert several new reasons for not applying the adopted detention rules, including potential labor disputes and operational difficulties if the existing system is eliminated. We respond to their arguments by noting that the prescribed rules need not eliminate bullpen and holding yard operations as petitioners imply. Although the discretion rests with individual shippers, the rules permit

their continued operation and with one exception places the burden of moving the trailer upon the responsible party. Shippers do have the alternative of resorting to prearranged scheduling or permitting the commencement or termination of line-haul travel at any point on their premises. It is true that these options require planning and coordination, but there is no justification for forcing the carrier or the line-haul rate structure to absorb and subsidize inefficient operations of large shippers. Loaded and empty trailors requested by consignors should not have to wait hours and days in limbo before free time can toll. Nor should the carrier be responsible for moving loaded or empty trailers requested by consignor and on their premises until such time as the trailer is unloaded or ready for line-haul. The rules as now modified clarify with certainty what detention is and shifts the burden of a shipper's size or inefficiency back upon the shipper. Presumably, shippers with inefficient operations will find the rules more costly, but this is as it should be. It is for each individual shipper to evaluate the available options in a manner suitable to its own needs. However, one thing is certain, all shippers will now be treated equally, regardless of their size.

Petitioners also assert that the prescribed rules will seriously hamper claims resolution, create liability disputes, and require the return to consignee's premises of carrier personnel for inspection of shipments at the unloading site after movement from the holding yard. Nevertheless, in the ordinary spotting of a loaded trailer without use of a holding yard, the driver ordinarily leaves the consignee's premises before the trailer is unloaded. There is no agent of the carrier at the dock under the ordinary circumstances because the existence of such an agent during the unloading process is impractical and contrary to the basic definition of spotting. Shippers cannot have it both ways. If a trailer is spotted then it must be unloaded without a carriers' agent standing by. The choice to spot is voluntary, and if damage is found somewhere on a

spotted trailer, the carrier generally is notified and unloading may cease. Finally, petitioners assert that the rules should be modified because their effectiveness will require rate adjustments. When rules of this magnitude become effective, it can reasonably be expected that some adjustments will be necessary. It is sufficient to note that carriers have discretion to change rates and charges, subject to protest and possible suspension.

Three petitioners object to 420 minutes free time for shipments exceeding 44,000 pounds. There is ample basis in the record to support this modification. Moreover, the balancing of competing interests in this proceeding provides additional grounds for granting the shippers' request in this regard. Experience under the rule will be helpful in reassessing the need for 420 minutes free time, and may lead to reevaluation of the entire free time allowance structure.

Several shipper petitioners have reasserted their objection to shifting the burden of proving the cause of detention to shippers. Basically, petitioners contend that the rule will impose substantial record keeping expenses upon them and is subject to carrier abuse. We find that these arguments have been considered thoroughly in our prior reports and we reaffirm our former conclusions on this issue. In so doing, we would like to point out that this area presents some of the most difficult issues in detention. The system developed by us is comprehensive and practical in light of the realities and it represents the first time an effort has been made to strike a balance between the conflicting interests.

The prescribed rules are workable and represent a substantial improvement over the former system, which frequently left lawful detention charges unpaid and unresolved.

Some petitioners renew their attack on the level of the

prescribed uniform detention charges. These arguments have been fully considered before and do not merit further consideration at this time. We therefore affirm our earlier conclusions on this issue.

Three petitioners assert that section 1(d) of the General Provisions of the rules governing detention with power is ambiguous. The portion of the rule at issue reads:

> When detention charges are attributable to others who are not parties to the Bill of Lading contract, *the charges will be assessed against the shipment.*

Although the disputed language is legally sufficient, in the interest of clarity, we replace the above underscored language with the following underscored material from page 727 of the first report, 124 M.C.C. 680:

> When charges must be assessed against the shipment because the person causing detention is not a party to the bill of lading, *the party responsible for the payment of the freight charges will be held responsible for any accrued detention charges.*

A number of petitioners have argued that the exclusion from the rules of "articles picked up or delivered to railroad care having prior or subsequent transportation by rail" is too broad. Petitioners contend that at a minimum the prescribed rules should apply to TOFC traffic moving in motor carrier equipment under motor carrier tariffs and operating authorities, because such service is equivalent to service covered by the prescribed rules. We find merit in petitioners' argument since the exclusion of motor common carriers from TOFC service would create artificial distinctions. Accordingly, we modify the rules to cover motor common carrier TOFC service functionally equivalent to ordinary motor common carrier service, as long as such service is not performed with railroad equipment. Notwithstanding this modification, it should be remembered

that this proceeding was designed to prescribe rules for motor carrier detention. Extension to railroad equipment would exceed the scope of this particular proceeding and encroach upon railroad demurrage rules. Accordingly, the quoted portion of the exceptions section of the rules appearing in the first sentence of 49 CFR §1307.35(e) is modified to read as follows:

> ". . . articles picked up or delivered to railroad care in railroad owned or leased equipment having prior or subsequent transportation by rail; . . ."

One further modification is necessary. Section 5(f) of the rules governing detention without power requires carriers to keep a record of the total actual weight of shipments when pickup is delayed in excess of 30 minutes. Total actual weight is only relevant for calculating free time. Section 4(b) provides no free time for spotted trailers if pickup is delayed more than 30 minutes. Instead, it imposes detention charges for vehicles with power from the time of arrival. Therefore, keeping a record of the actual weight is unnecessary. Accordingly, paragraph (f) in section 5 is stricken from the rule, and the remaining paragraphs are relettered as appropriate.

In view of the conclusions expressed above, we see no need to grant the requests for oral argument. Accordingly, that request is denied.

Issues not specifically discussed have been considered and found not to warrant discussion.

It is ordered:

Petitions for reconsideration and modification are granted in part, as detailed in this decision.

Petitions for reopening and oral argument are denied.

Decided September 14, 1977.

By the Commission. (Vice Chairman Clapp did not participate.)

H. G. HOMME, JR.
Acting Secretary

(SEAL)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1162

JONES TRANSFER COMPANY, CENTRAL TRANSPORT, INC. AND U.S. TRUCK COMPANY, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

No. 77-1189

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC. IN OPPOSITION

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BRIEF OF RESPONDENT SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC. IN OPPOSITION

Respondent, Southern Motor Carriers Rate Conference, Inc., files this brief in opposition and prays that the petitions for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the judgment and opinion of that court entered in this proceeding on December 29, 1977, be denied.

STATEMENT OF THE CASE

It will be helpful to have a broader overview of the decision of the Commission and the regulations resulting than that provided by the petitioners in their statements of the case.

This proceeding involves judicial review of regulations promulgated by the Interstate Commerce Commission pursuant to rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 553.

The Commission prescribed uniform nationwide rules to apply to practically all shipments governing detention of vehicular equipment of motor common carriers on the premises of shippers and receivers of freight. The primary purpose was to get away from the existence of varying rules and regulations prevailing from region to region and from carrier to carrier now found to provide opportunities for abuse and discrimination. (33a; 34a)

Two basic rules were prescribed: one for detention of vehicles with power units and the other for detention of vehicles without power units. Both rules provide for free time according to the characteristics of the shipment, after which charges will begin to run if the equipment has not been released. (154a-161a)

Substantial distinction is made between detention of vehicles with power units and vehicles without power units. Where the power units are detained, the carrier's driver is also detained and therefore the free time is much shorter and the charge much higher. The distinction is designed to give the carriers and shippers and

receivers flexibility in working out an arrangement whereby the power unit and the driver may be freed up quickly, leaving the trailer available for more convenient loading or unloading. The latter practice is referred to as spotting or dropping of trailers. Free time is also allowed where equipment is detained without power, after which charges begin to accrue. (61a-78a)

For the first time, in both rules the Commission requires the carriers to enter into a prearranged schedule for arrival of the vehicle for loading or unloading, departure from which will accord prescribed relief to the shipper or receiver. (37a-38a)

Detention charges are assessed as an incentive for shippers or consignees to release carrier equipment promptly. The charge is designed both to compensate the carrier for being unable to use its equipment and to penalize the shipper or receiver for undue or unreasonable detention of the equipment as an incentive for quicker release. (52a)

The primary challenge to the prescribed rules concerns whose responsibility it is to switch trailers which are left without power between holding yards on the one hand and loading or unloading platforms on the other. Holding yards are areas on or near the shipper's or receiver's dock which are used as temporary parking for either empty or loaded trailers awaiting the opportunity to be moved into position for loading or unloading. The carrier will spot or drop trailers within the holding yard and then the trailers must be switched to or from the loading or unloading platform as the shipper's or receiver's needs dictate.

The Commission determined that problems with prompt unloading were usually attributable to the receiver and that the use of holding yards at destinations for loaded trailers awaiting unloading primarily benefits the receiver and not the carrier. On the other hand, it determined that in the situation where empty trailers are dropped at the origin, the greater benefit may often be to the carrier. Therefore, different provisions were prescribed as regards the carrier's responsibility for switching the empty trailers versus the loaded trailers. Where the primary benefit is to the carrier in dropping empty trailers, the carrier is to be responsible for the later switching of the empty trailer from the holding yard to the loading dock. On the other hand, in the case of loaded trailers awaiting unloading where the primary benefit is to the receiver, it is the receiver who must assume the responsibility for switching the loaded trailer to the dock for unloading. (140a-142a; 167a-170a)

It is important to understand that the provisions for detention of vehicles without power, the practice of spotting or dropping of trailers, is optional and not forced upon the shippers or receivers. The free time provisions under the rule governing detention of vehicles with power units, together with the provisions for prearranged scheduling, are designed to accommodate either loading or unloading within a reasonable time without any detention charges. The question of who is to switch the trailers arises only when the shipper or receiver opts for reasons of their own to establish holding yards away from loading or unloading docks. (168a-169a)

The Third Circuit Court was persuaded that there

is a rational basis for the I.C.C. conclusions and it denied the relief sought in the petitions for judicial review.

ARGUMENT

There Is No Conflict With Applicable Decisions Of This Court

The petitioners contend that the Third Circuit has "misconceived and misapplied" the decision of this Court in *United States v. Allegheny-Ludlum Steel Corp.* 406 U.S. 742 (1972). They assert that the Third Circuit has applied an unduly restricted scope of review.

A fair reading of the opinion of the court shows that it understood and properly applied the correct standards for judicial review.

The court was mindful that it was reviewing the Commission's exercise of its rulemaking authority, a wholly legislative function.

The court stated in the opening paragraph of the opinion:

> Because we are persuaded that there is a rational basis for the I.C.C. conclusions, we will deny the relief sought in the petitions for review.

The court proceeds to review the lengthy rulemaking proceedings before the Commission and summarizes generally the provisions of the rules and the contentions of the parties.

The petitioners characterize the opinion of the Third Circuit incorrectly. The opinion does not in-

dicate that the Court felt barred from meaningful inquiry as a reviewing court. The Third Circuit did not fail to make a searching and careful inquiry.

The Third Circuit started from the standard for judicial review set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(a). It noted that the reviewing court shall hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. From that starting point it observed:

> But we do not write on a clean slate in fashioning a construction of what is arbitrary and capricious in the context of reviewing I.C.C. *rulemaking* functions.

Next, it quoted the standard of judicial review expressed by this Court in *Allegheny-Ludlum*. True, the the Third Circuit characterized this standard as one that "severely limits the extent of judicial review." It seems apparent from the decision of this Court in *Allegheny-Ludlum* that the characterization is accurate; yet certainly not barring meaningful inquiry nor nullifying the judicial role in the reviewing process. The Third Circuit did not see itself barred from meaningful inquiry nor did it see its role nullified. To the contrary, it announced at the outset that it was persuaded that there is a rational basis for the I.C.C. conclusions.

In *Allegheny-Ludlum* this Court recited the well established standard for judicial review found in prior decisions of this Court:

> We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of

> the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported.

The above standard applies to judicial review of actions of the Commission in general. This Court mentioned in *Allegheny-Ludlum* that as to the Commission's rulemaking authority, wholly legislative in nature, the Commission is limited to establishing a reasonable rule. If rationally supported, the Commission must be upheld. The Third Circuit was so persuaded.

After observing the standard for judicial review cited in *Allegheny-Ludlum*, the Third Circuit observed in passing that it might have been "receptive to some of the arguments" presented by the petitioners were it able to utilize a more expansive notion of what is "arbitrary, capricious, and an abuse of discretion." It did observe, also in passing, that the I.C.C.'s discussion of some of the points raised by the petitioners "was, at best, laconic." The latter is not a term of derogation. The use of a few words and conciseness is often a virtue. It cannot be inferred from these passing comments that the Third Circuit felt barred from meaningful inquiry or that its role was nullified. It cannot be inferred that the Third Circuit would have under any circumstances reached a different conclusion from that of the Commission.

As was the situation in *Allegheny-Ludlum*, this proceeding was governed by the provisions of 5 U.S.C. § 553 of the Administrative Procedure Act and the

following from page 758 of *Allegheny-Ludlum* is equally applicable here:

> This proceeding, therefore, was governed by the provisions of 5 U.S.C. § 553 of the Administrative Procedure Act, requiring basically that notice of proposed rulemaking shall be published in the Federal Register, that after notice the agency give interested persons an opportunity to participate in the rulemaking through appropriate submissions, and that after consideration of the record so made the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. The "Findings" and "Conclusions" embodied in the Commission's report fully comply with these requirements, and nothing more was required by the Administrative Procedure Act.

Petitioners have not shown that the opinion of the Third Circuit is in conflict with applicable decisions of this Court. Neither have they shown any other reasons for granting a writ of certiorari (Rule 19).

The Commission Decision Is Supported By The Facts And The Law And Has A Rational Basis

The Commission initiated this proceeding in 1973 when it opened the rulemaking process for comments from interested parties. (17a-18a) It received responses from 69 parties or representative groups expressing their views and opinions on the proposed uniform detention rules. (81a-83a) The Commission carefully studied the data presented by all interested parties and in 1976 issued its initial decision, some 118 pages long. (16a-134a) The regulations adopted in this initial decision were altered considerably from the first pro-

posed rules in light of the statements and responses received by the Commission. (80a) The Commission then received petitions for reconsideration of its initial decision and in 1977 issued a second decision of 30 pages that further modified the rules to reflect meritorious views and positions of the parties. (135a-164a)

Throughout the entire proceedings, petitioners were parties to the rulemaking process and actively participated. The arguments of petitioners to this Court are in essence the same arguments that were put before the Commission and the Third Circuit. Petitioners are now attempting to convince this Court to reconsider their arguments and to substitute this Court's judgment for that of the Commission. It is well settled that this Court will not substitute its judgment for that of the Commission, *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974) and other legion cases.

Petitioners attack the provision regarding spotting in holding yards, contending that the rule improperly shifts a "traditional" duty performed by the carriers to the shipper or receiver. They contend that the Commission promulgated this rule without rational explanation or reasonable basis. They choose to ignore the Commission's well-reasoned explanation of the rule set forth in its decision. The Commission substantiates the need for the rule and answers these same arguments. (46a; 140a-142a; 165a-170a)

Petitioners contend that the practice of spotting and the use of holding yards are for the mutual benefit of carriers, shippers and receivers. The Commission recognized that origin detention and destination detention

are distinct issues. (140a-141a) Each serves a separate and distinct purpose for the carriers and for the shipper or receiver. In origin detention, it is most often a convenience for the carrier to drop an empty trailer for loading. The carrier may not have a facility of its own within the area and if the shipper provides a holding yard for dropping empty trailers, the carrier is able to keep sufficient equipment within close access to the shipper's facility until needed. The Commission properly considered this type of holding yard arrangement as primarily beneficial to the carrier. Therefore, in the rule the carrier has the responsibility for switching an empty trailer to the shipping dock for *loading*. The only time this arrangement is negated is when the shipper specifically directs the carrier to place an empty trailer on its yard at a designated site. If the shipper so directs, the placing of the trailer is then for the benefit of the shipper and once the trailer is placed at the designated site, the carrier has no further obligation until the trailer is loaded and ready for pickup (140a-142a; 168a)

In destination detention, the situation is quite different. When a loaded trailer arrives at destination the receiver has an election. He may arrange for the trailer to be unloaded immediately; or he may place the loaded trailer within a holding yard to await unloading at a later convenience. The carrier receives no benefit from having a loaded trailer located within the holding yard for an indeterminate length of time. The holding yard at destination is for the sole benefit of the receiver. (168a) The carrier would be perfectly willing to immediately unload and remove the trailer from the premises; but when prevented from doing so by either an overcrowded unloading facility or by the particular

needs of the receiver, then it is the receiver that directs the carrier to place the trailer within its holding yard and the receiver which benefits. The switching of the trailer between the holding yard and the unloading dock should rightfully be the responsibility of the receiver since he is the one benefiting. He is in effect using the carrier's trailer for warehousing his goods. The Commission answered petitioners' arguments at length in its decision. (168a-169a)

The Commission included in the detention rules a provision that the carrier will work with the receiver to provide a prearranged delivery schedule without additional cost to the receiver. With such prearranged scheduling, the receiver should be able to prevent any backup at its unloading point. (144a; 169a) If the receiver does not wish to assume responsibility for switching the trailers to and from the holding yards, he may utilize "live delivery" with prearranged scheduling.

Petitioner National Industrial Traffic League contends that the Commission arbitrarily set the amount of the detention charges without considering the actual cost to the carriers for detention of their equipment. In its initial order, the Commission correctly concluded that cost was a factor to consider, but only a secondary factor. (52a-53a) The main purpose of a detention charge is to act as a penalty to encourage the receiver to quickly release carrier equipment. Therefore, even though cost may be a basis of determining reasonableness, the actual cost may not be high enough to provide a sufficient inducement. The District of Columbia Circuit has stated:

> Detention charges have a double purpose, one of which is to secure compensation for the use of a car, ship or vehicle. The other is to promote efficiency in the operation. *American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission*, 444 F.2d 824, 829 (D.C. Cir. 1970).

In this case the Commission set a charge that it felt would compensate the carrier and still provide sufficient inducement for quick release of carrier equipment. (138a) The fact that the charge was set at a rate above the actual cost is not a proper basis for overturning the Commission decision.

Petitioners contend that the Commission is venturing into a new area and forcing upon shippers and receivers new burdens. This is not the case. (145a; 170a) The Commission is placing the responsibility for detention with the one who controls the detention and is most benefited by a particular practice. The Commission addressed the issue of burden of proof in detail and adequately substantiated its conclusions in fact and in law. (145a; 170a) The Commission has acted in the past to promote prompt and efficient transportation service through the use of detention charges and prescribed rules governing detention. (28a) *Detention of Motor Vehicles — Middle Atlantic & New England*, 344 I.C.C. 333 (1973); *Segregation of Freight, New England & Middle Atlantic States*, 335 I.C.C. 239 (1969); *Detention of Motor Vehicles — Middle Atlantic & New England*, 325 I.C.C. 336 (1965); *Middle Atlantic Conference v. United States*, 353 F. Supp. 1109 (D.D.C. 1972). In this case, the Commission has imposed obligations upon the shippers and receivers in order to ensure that the public transportation needs

will be met by increasing carrier efficiency. This is not the first time this type of action has been taken. The shippers and receivers are not subject to Commission regulation; but the carriers are. By limiting the carriers' duty and ability to perform spotting and switching operations, the Commission has properly made the shippers and receivers responsible for moving and switching trailer equipment when such movement is solely for the benefit of the shipper or receiver. The uniform nationwide detention rules will ensure that all shippers and receivers, regardless of their size, will receive fair and equal treatment.

CONCLUSION

The Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., BRIEF IN OPPOSITION

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ARGUMENT

Petitioners, Jones Transfer Company, et al., request this Court to issue its writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit which upheld new rules adopted by the Interstate Commerce Commission prescribing uniform rules and charges applicable to the detention of the equipment of motor common carriers. This action presented a routine review pursuant to the Administrative Procedure Act (5 U.S.C. Sec. 706) of the decisions reached by the I.C.C. in an informal rulemaking proceeding. In seeking the writ of certiorari, the Petitioners contend that: (1) The Court of Appeals for the Third Circuit erred in construing this Court's opinion in *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), in reviewing action taken by the Interstate Commerce Commission in the rulemaking proceeding entitled

Ex Parte No. MC-88, Detention of Motor Vehicles-Nationwide, 124 M.C.C. 680 (1976), 126 M.C.C. 803 (1977), and (2) that the Interstate Commerce Commission acted arbitrarily and capriciously in promulgating rules regulating the application of detention charges where use is made of holding areas provided by shippers or consignees.

I.
THE COURT OF APPEALS APPLIED THE PROPER STANDARD FOR REVIEW.

Review of the opinion of the Court of Appeals clearly reveals the erroneous nature of Petitioners' first contention that the Circuit Court did not understand the appropriate scope of review. In its opinion, the Court described its responsibility on judicial review (9a and 10a)[1] as follows:

> The starting point for judicial review of the ICC orders is 5 U.S.C. Section 706(2)(A): 'The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .' But we do not write on a clean slate in fashioning a construction of what is arbitrary and capricious in the context of reviewing ICC *rulemaking* functions. The Supreme Court has specifically and definitively addressed this aspect of statutory construction, and has formulated a scope and standard that severely limits the extent of judicial review:

The standard of judicial review for actions of the Interstate Commerce Commission in general, *Western Chemical Co. v. United States*, 271 U.S. 268 (1926), and for actions taken by the Commission under the authority of the Esch Act in particular, *Assigned Car Cases*, 274 U.S. 564 (1927), is well established by prior decisions of this Court. We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported. In judicially reviewing these particular rules promulgated by the Commission, we must be alert to the differing standard governing review of the Commission's exercise of its rulemaking authority, on the one hand, and that governing its adjudicatory function, on the other:

> In the cases cited, the Commission was determining the relative rights of the several carriers in a joint rate. It was making a partition; and it performed a function quasi-judicial in its nature. In the case at bar, the function exercised

> by the Commission is wholly legislative. Its authority to legislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general. *Assigned Car Cases*, *supra*, at 583.

United States v. Allegheny-Ludlum Steel Corporation, *supra*, 406 U.S. at 748-49.

Following this statement of the appropriate standard, the Court proceeded to find the Commission's findings and conclusions to be "rationally supported."

It is egregious to suggest that the Third Circuit did not understand and apply the standard explicitly stated in its opinion. While the language used in the opinion below might be construed as an expression of a preference for a somewhat broader standard of review, it is simply not evidence that the Circuit Court did not understand and apply the proper standard of review. Under the *Allegheny-Ludlum* standard, the Court found the I.C.C. order to represent a reasonable balancing of competing interests and policies.

Similarly, Petitioners' argument that the decision below conflicts with those made by other Circuit Courts who remanded specific agency decisions is specious. Those cases involved different subject matter, statutory provisions and records. They simply do not demonstrate by inference or otherwise that a conflict exists between the various circuit courts of appeals as to the proper standard of review of informal rulemaking provisions. The case of *Bowman Trans. v. Arkansas-Best Freight*, 419 U.S. 281, cited by Petitioners, did, in fact, involve reversal of a district court decision holding action by the I.C.C. to be arbitrary, capricious and an abuse of discretion. As the Court noted in that opinion, the scope of review under the "arbitrary and capricious" standard is a narrow one and the reviewing court is not empowered to substitute its judgment for that of the agency, 419 U.S. 285.

Neither Petitioners nor Respondents quarrel with the proposition that the unanimous opinion of this Court in *United States v. Allegheny-Ludlum Steel Corp.*, *supra*, is the controlling authority on standard of review. Indeed, it is worth noting that it is a peculiarly appropriate precedent, involving, as did the proceeding below, a general informal rulemaking in which the Interstate Commerce Commission was concerned primarily with the resolution of policy matters of an essentially legislative character involving evaluation of problems particularly within the agency's knowledge and expertise related to the utilization of common carrier equipment. Judge Aldisert was particularly

well qualified to apply the *Allegheny-Ludlum* standard, having been involved in that case as well.

We do not believe it is unfair to suggest that Petitioners' attack on the standard of review applied by the Circuit Court amounts to little more than an attempt to bootstrap past the requirement of this Court's Rule 19 that they make a showing that "special and important reasons" exist for granting certiorari.

II.
THE DECISION OF THE INTERSTATE COMMERCE COMMISSION WAS NOT ARBITRARY AND CAPRICIOUS.

The second ground advanced to support Petitioners' request for grant of certiorari is that the decision of the Interstate Commerce Commission was arbitrary, capricious and an abuse of its discretion in regulating application of detention charges in situations in which use is made of a holding yard provided by the shipper or consignee. This ground essentially amounts to no more than a request that this Court again perform the function assigned to the Court of Appeals to review the administrative record to determine its adequacy in the hope it will be inclined to second guess the decision of the Court of Appeals. Ordinarily, certiorari will be denied to review the decision of the Court of Appeals involving a fair assessment of the record on the issue of substantiality of evidence, *N.L.R.B. vs. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-03 (1951); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 1978 (1938).

The issue of the use of holding yards or "bull pens" was the subject of discussion and argument by numerous participating parties including the major shipper, Ford Motor Company, in their initial submissions to the Commission. It was also the subject of a substantial number of petitions for reconsideration after the Commission adopted a proposed uniform detention rule in its initial Report and Order. These petitions were carefully evaluated by the Commission in its Report and Order on Reconsideration (136a-142a), and, as a result thereof, the Commission modified the rule to permit use of holding yards without liability for detention charges and to require the carrier to shuttle the trailer from a holding yard, when an unloaded trailer is placed in a holding yard for reasons of **carrier** convenience. As modified, the rule apparently met with acceptance from major segments of the shipping community, such as the meat packers, who argued that the rule in its initial form would have impaired the use of trailer spotting for the meat packing industry. The Commission, however, maintained those aspects of its rule which it found necessary to prevent preference and prejudice as between shippers.

The implication that the Commission's rule mandates higher cost and inefficient carrier operations or curtails the use of holding yards is not warranted and the contentions of Ford Motor Co. to this effect were repeatedly rejected by the Commission (139a). The only effect of the Commission's rule is to require shippers, rather than carriers, to bear "shuttle" and "detention" costs of

equipment in those situations where equipment is initially placed in holding yards essentially for the shipper's convenience. If holding yards proved to be economically and operationally efficient prior to adoption of the new regulations, they presumably will continue to be used hereafter. And, as the Commission noted in its Decision and Order decided September 14, 1977 (169a), there is no justification for forcing the carriers or linehaul rate structure to absorb and subsidize inefficient operations of large shippers.

CONCLUSION

For the foregoing reasons, the Peititon for Certiorari should be denied.

Respectfully submitted,

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[1]References are to pages of Petitioners' joint appendix to Petitions for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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On Petitions for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT MIDDLE ATLANTIC CONFERENCE IN OPPOSITION

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Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

QUESTIONS PRESENTED

1. Did the Court of Appeals erroneously apply the standard of review announced by this Court in *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972)?

2. Did the Interstate Commerce Commission act arbitrarily and capriciously in prescribing motor carrier detention rules which: (1) require consignees to bear the expense of moving trailers from their holding yards to their unloading docks; (2) establish a uniform, nationwide detention charge that is sufficiently penal without providing an incentive to prolong detention and well within the range of charges presently in effect; and (3) provide that charges will be assessed against shippers and receivers of property for undue delay in the loading and unloading of carrier vehicles when such delay is not attributable to the carriers?

STATEMENT OF THE CASE

On June 22, 1973, the Interstate Commerce Commission instituted a rulemaking proceeding pursuant to the Administrative Procedure Act, 5 U.S.C. § 553, to consider adoption of proposed rules governing the detention of motor vehicle equipment by shippers and receivers of property. The proposed rules would supersede numerous existing rules which vary from region to region and carrier to carrier. As the Commission pointed out in its Notice of Proposed Rulemaking, the failure of motor carriers to provide uniform vehicle detention rules "has given rise to shipper and carrier complaints alleging unjust and unreasonable practices, unjust discrimination, preference and prejudice, as well as unlawful concessions and rebates." Accordingly, it stated that the purpose of the proceeding would be "to discourage undue delays of carriers' vehicles at origins, stopoff points, and destinations, at the same time to assure lawful, nondiscriminatory, nonpreferential, nonprejudicial, reasonable and adequate service, and reasonable vehicle detention rates and charges with respect to all classes, types and sizes of shippers and receivers of interstate freight shipments, nationwide" (A. 117a).

Following receipt of written statements from numerous parties representing shippers, carriers, government agencies,

and others,[1] the Commission issued its report and order prescribing uniform nationwide detention rules on May 25, 1976 (A. 16a-134a). Following petitions for reconsideration, the Commission modified in part the report and order by a second report and order issued June 3, 1977 (A. 135a-164a). By order dated August 31, 1977 (R. 1206-1208), the Commission denied various petitions for stay of its orders. A final order was issued September 15, 1977 (A. 165a-173a) in which the I.C.C. granted petitions for reconsideration and modification in part and denied petitions for reopening and oral argument. Hence, the rules under judicial review are the product of over four years of extensive analysis and review by the Commission. As it pointed out in its order dated August 31, 1977, the rules "were drafted to reach an equitable balance among the parties and thereby bring order to a troublesome and abused area."

Detention rules of motor common carriers, like demurrage rules of railroads, provide a fixed amount of so-called free time for the loading or unloading of vehicles and impose a detention charge for delays beyond the free time not attributable to the carriers. The Commission's order prescribes two separate rules, each complete and self-contained. The first governs the detention of straight trucks or tractor-trailer combinations, which have been ordered or used to transport shipments subject to truckload rates. It applies when vehicles are delayed or detained at the premises of consignors or consignees "only when such delay or detention is not attributable to the carrier" (A. 148a). As proposed, the rule applied "only when such delay or detention is attributable to consignor, consignee, or others designated by them" (A. 119a). The proposed rule was modified in response to complaints of shipper abuse of existing rules (A. 62a). Free time under this rule varies according to the weight of the shipment and ranges from two hours for shipments of less than 10,000 pounds to six hours for shipments of 36,000 pounds or more. The detention charges are $18 for the

[1] Some 69 parties filed initial responses to the Notice of Proposed Rulemaking (A. 18a).

first hour or less and $9 for each additional 30 minutes or fraction thereof. The Commission found that these charges are "well within the range of charges presently in effect" and "are sufficiently penal without providing an incentive to prolong detention" (A. 60a).

The second rule governs the detention of trailers only. Consignors and consignees may, at their option, require that trailers be dropped or "spotted" in holding yards on their premises for loading or unloading at their convenience. Free time is greater and detention charges are lower under this rule than under the first in recognition of the fact that the carriers' employees and power units are not detained. However, when the carrier's employee assists in loading, unloading, or checking the freight, the detention provisions governing vehicles with power units apply whether or not the power unit is actually detained.

Free time commences once a trailer is spotted at a site designated by the consignor or consignee. Once a trailer is spotted, the carrier will not move it until it is ready for pickup after loading or unloading. The consignor or consignee is responsible for moving the trailer from the holding yard to the loading or unloading dock. The practice of some carriers in providing this switching service is prohibited under the rule because the economies realized by not having drivers and power units detained "are lost when a carrier must either return a tractor to the yard to shuttle a trailer or pay an agent to do so" (A. 139a). However, it is often advantageous for carriers to drop empty trailers in trailer pools located on shippers' premises so that the trailers will be readily accessible for potential movements of freight. In such cases, the empty trailers, although usually used to transport freight for the shipper on whose premises the trailer rests, may also be used to transport freight for different shippers (A. 148a). The rule initially adopted was modified to provide that detention charges will not apply to trailers parked for a carrier's convenience. The rule provides that empty trailers placed at the premises of a

consignor without specific request are not spotted until the carrier receives the consignor's request and places the trailer for spotting. The carrier has the obligation of moving the trailer from the place where it was dropped on the consignor's premises to the specific site designated for spotting. The Commission refused to modify the rule to permit this practice with respect to loaded trailers, however, since "a carrier derives no benefit from having its trailer stand idle awaiting unloading" (A. 141a). Spotted trailers are allowed 24 hours of free time for loading or unloading. The detention charges are as follows:

(1)	For each of the first and second 24-hour periods or fraction thereof (Saturdays, Sundays, and holidays excepted),	$25
(2)	For each of the third and fourth 24-hour periods or fraction thereof (Saturdays, Sundays, and holidays excepted),	35
(3)	For the fifth and each succeeding 24-hour period or fraction thereof (Saturdays, Sundays, and holidays included).	50

Appeals directed only to the second rule were filed in the United States Court of Appeals for the Third Circuit by Jones Transfer Company, *et al.* (petitioners in No. 77-1162) and Ford Motor Company. Specifically, these petitioners challenged the Commission's conclusions "that the carriers' line-haul obligation ends when a loaded trailer is dropped in the consignee's holding yard" and "the cost of moving the trailer from the holding yard to the unloading dock is the responsibility of the consignee" (A. 168a). National Industrial Traffic League (petitioner in No. 77-1189) also challenged these conclusions and, in addition, it challenged the Commission's findings and conclusions relating to the level of detention charges for vehicles with power units and the burden of proving responsibility for delay of such vehicles.

By order filed September 2, 1977, the Court of Appeals stayed the effectiveness of the Commission's order pending

completion of judicial review. On December 29, 1977, the Court affirmed the Commission's decision in a *per curiam* opinion issued in the three consolidated cases. The Court held that the Commission's findings and conclusions were rationally supported and that the evidence in the record was sufficient to sustain the exercise of the Commission's rulemaking authority (A. 10a-11a).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Petitioners advance two principal reasons why this Court should review the decision of the Third Circuit. First, they argue that the Court below misconstrued this Court's opinion in *United States v. Allegheny-Ludlum Steel Corp., supra.* Second, they say that the Commission's decision "arbitrarily and capriciously" requires shippers to bear the expense of moving trailers from holding yards to unloading docks, shifts the burden of proving the causes of delay from carriers to shippers, and establishes a detention charge which is not "cost justified." An examination of their petitions shows that these contentions are without merit, and that petitioners have failed to set forth any other special and important reasons why this Court, in the exercise of its sound judicial discretion, should grant certiorari. (Rule 19(1)).

The Court of Appeals Properly Applied the Appropriate Standard of Review

Petitioners do not question that this Court's decision in *United States* v. *Allegheny-Ludlum Steel Corp., supra,* is controlling here. Rather, they say that the Court of Appeals failed to properly apply the standard of review announced in

Allegheny-Ludlum. This is patently not so. In *Allegheny-Ludlum,* this Court set forth the standard of judicial review for actions of the Interstate Commerce Commission as follows:

> "We do not weigh the evidence introduced before the Commission, we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported." 406 U.S. at 749.

The Court of Appeals applied that standard here. It announced at the outset of its opinion that it would deny the relief sought in the petitions for review because it was "persuaded that there is a rational basis for the ICC conclusions" (A. 6a). In the course of its opinion, it quoted the standard of review set forth above. It concluded its opinion as follows:

> "... measuring the present petitions against the appropriate standard of judicial review, we conclude that the Commission's findings and conclusions 'are rationally supported'. And to the extent that evidence was required in the record to support the contested conclusions, we find it sufficient to sustain the exercise of the ICC's rulemaking authority" (A. 11a).

Petitioners say that the Court of Appeals erred in stating that *Allegheny-Ludlum* "severely limits the extent of judicial review." A fair reading of the decision in *Allegheny-Ludlum* shows that the Court's assessment of it is correct. In any event, petitioners raise only a matter of semantics. Petitioners admit that the "scope of review is a narrow one which requires a considerable degree of deference to the administrative agency" (N.I.T.L. Pet., p. 12).

The Court's statement that it "might have been receptive to some of the arguments presented by the petitioners" were it

"able to utilize a more expansive notion of what is arbitrary, capricious, and an abuse of discretion" does not indicate that it applied an improper standard of review. On the contrary, it shows that the Court was aware of the limited scope of judicial review in a case such as this. It is a long established maxim in the field of administrative law that the courts have no authority to substitute their judgment for that of an agency in the promulgation of regulations. *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 64 S.Ct. 1215 (1944).

Petitioner National Industrial Traffic League states that "a reading of the court's opinion below reveals that it made no attempt to engage in the type of scrutiny which is necessary in order to perform properly the judicial role in reviewing agency decisions which are the product of informal rulemaking" (N.I.T.L. Pet., p. 15). We submit that this allegation is wholly unfounded. It is clear from the Court's opinion and its questioning of counsel at oral argument that it took a close look at the record in order to properly educate itself. Having done so, it concluded that there was a rational basis for the Commission's conclusions. Nothing more was required of the Court.

The Commission's Decision
Was Not Arbitrary and Capricious

Both petitioners attack the provision of the spotting rule which requires consignees to bear the expense of moving trailers from their holding yards to their unloading docks. They argue that motor carriers have a traditional duty to deliver to the unloading dock trailers which have first been dropped in a holding yard. On the contrary, the line-haul rates of motor carriers have traditionally included only one pickup and one delivery. *Paperboard Between New Jersey and New York*, 315 I.C.C. 187, 190 (1961).

Petitioners contend that the placing of trailers in holding yards at destination is for the mutual benefit of carriers and consignees. The Commission properly recognized, however, that "a carrier derives no benefit from having its trailer stand

idle awaiting unloading." Carriers want their trailers unloaded as quickly as possible so that they can be made available for other shipments.

Petitioners assert that the Commission's rule will "curtail" the use of holding yards. The only effect of the rule will be to shift the expense of shuttling the trailers from the carriers to the consignees. If, as petitioners say, holding yards are "the most efficient and economical means of effecting delivery" the shifting of this expense will not curtail their use.

Petitioner National Industrial Traffic League contends that the establishment of the $18 per hour detention charge was arbitrary because the charge was not shown to be cost justified. However, it is well settled that the primary purpose of detention and demurrage charges is not to compensate carriers for services rendered, but "to eliminate the abuse of excessive and unreasonable detention." *American Wholesale Lumber Assn.* v. *Director General*, 66 I.C.C. 393, 396, 397 (1922). Hence, as was there held, a "charge in the nature of a penalty is not unlawful if its purpose is to secure for the public a more efficient use of equipment."

True enough, the question of carrier costs may be relevant to a determination of what constitutes a lawful level of detention charges. As the Commission stated:

> "Although historically regarded as a penalty, it stands to reason that detention charges must cover carrier costs. Otherwise, the carrier is the party being penalized" (A. 52).

The question of carrier costs is irrelevant here, however, because no claim was made that the $18 per hour charge would be insufficient to cover carrier costs.[2]

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[2] The Commission stated in its initial report that revisions in the level of the charge would be considered upon a showing that carrier costs exceed the detention charge. In its second report, the I.C.C. indicated that it would entertain a petition from Alaskan Carriers related to this issue.

In determining the level of the detention charge, the Commission considered the 1975 levels of detention charges of nine major rate bureaus. Those charges ranged from $12 per hour to $20.30 per hour. The Commission noted that the uniform nationwide charge of $18 per hour was "well within the range of charges presently in effect." It concluded as follows:

> "We believe these charges at this time are sufficiently penal without providing an incentive to prolong detention, but upon a showing that such charges fail to cover regional costs, they will be appropriately revised." (A. 61a).

National Industrial Traffic League also contends that the Commission acted arbitrarily and capriciously in placing the burden of proving the causes of delay on shippers. The proposed rule was modified to be applicable in all cases where delay is not specifically attributable to the carrier because an existing rule wnich placed the burden of pinpointing the causes of delay on carriers had not worked. Because of the difficulty in proving the causes of delay, shippers were able to avoid detention charges by pointing to any occurrence as justification for blaming the delay on the carriers.

Petitioner argues that shippers should not be held responsible on delays which are beyond their control. To be workable any detention rule must place under the "control" of the shipper any delays other than those that are attributable to the carriers for the simple reason that all other delays fall in a category where they cannot be feasibly isolated as to a specific cause. The necessity and practicability of a detention rule need not and does not depend on the isolation of the cause of delay in a particular instance. The rule presumes delays, and further presumes that they will be caused by many factors, many of which cannot be anticipated. It is for this reason that a detention rule must place on the one under whose control the delay occurs the onus of accounting for the delay of equipment.

In *American Export—Isbrandtsen L., Inc.* v. *Federal Maritime Commission,* 444 F.2d 824 (1970), the Court rejected an argument similar to that raised by petitioners here. The Court there held that the Federal Maritime Commission has jurisdiction to require operators of marine terminals to pay motor carrier charges for the undue detention of trucks. The Court upheld an order of the FMC prescribing a detention rule similar to the rule involved here. The terminal operators contended that they should not be made responsible for delays due to insufficient or inefficient labor since the labor situation existing at the piers was beyond their control. In rejecting this argument, the Court said:

> "In considering this issue we must also recognize that we are dealing with a detention rule, which is much the same as demurrage. Such rules are designed to operate on the average as it is obviously impractical to have an adjudicatory hearing over the trivia involved in each truck delay. Thus, the reasonableness of such rules is to be found in their overall operations." 444 F.2d at 831.

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER TERM, 1977

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v.

UNITED STATES OF AMERICA, ET AL.

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

FORD MOTOR COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-11a)[1] is reported at 569 F. 2d 196. The first opinion of the

[1]"Pet. App." refers to the separately bound joint appendix.

Interstate Commerce Commission (Pet. App. 15a-134a) is reported at 124 M.C.C. 680. The opinion of the Commission on reconsideration (Pet. App. 135a-164a) is reported at 126 M.C.C. 803. The opinion of the Commission granting further reconsideration but denying reopening (Pet. App. 165a-173a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1977. The petition for a writ of certiorari in No. 77-1162 was filed on February 16, 1978; the petition in No. 77-1189 was filed on February 21, 1978; and the petition in No. 77-1370 was filed on March 27, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the rules promulgated by the Interstate Commerce Commission to fix charges for the detention of equipment and to define the point at which detention begins and ends are arbitrary or capricious.

STATEMENT

This case involves the uniform motor carrier detention rules promulgated by the Interstate Commerce Commission.[2] These rules are the culmination of a lengthy rulemaking proceeding, which involved three rounds of public comments and three opinions of the Commission. The rules were devised in response to concerns that existing practices discriminated in favor of large shippers that made extensive use of "holding yards" in which they assembled and detained transportation equipment after

[2]The rules are not yet in effect. The court of appeals stayed the effectiveness of the rules pending judicial review, and the stay was continued when the court withheld issuance of its mandate pending this Court's disposition of the petitions for certiorari.

arrival but before unloading. Some parties complained that the lack of uniformity led to arbitrary charges and unlawful concessions; others contended that some charges levied on "detention"[3] were so small that they amounted to unlawful rebates, effectively requiring small shippers that did not use holding yards to subsidize the large shippers that did (see Pet. App. 17a).

The Commission's new rules establish a uniform, nationwide set of detention charges that shippers must pay when they create delay in loading or unloading of transportation equipment. The rules have two major sections: Section 1 governs detention of vehicles "with power" (usually tractor-trailer combinations), and Section 2 governs detention of vehicles "without power" (usually trailer units by themselves).[4] The sections establish periods of "free time" during which detention charges do not apply and uniform rates for detention thereafter. The Commission selected the uniform rate for detention charges after examining the range of carrier-set charges now in effect; the uniform rate is well within that range (Pet. App. 61a).

Because the rules were instituted in response to concerns about large scale holding operations, the most important provisions concern detention of vehicles "without power," which is the usual way vehicles are

[3]The new rules define "detention" as any delay of vehicles at the point of delivery or pickup, where the delay is not attributable to the carrier (Pet. App. 148a).

[4]Petitioners in Nos. 77-1162 and 77-1370 do not challenge the provisions of Section 1.

detained in a marshalling or holding yard.[5] If the consignor or consignee is not ready to load or unload the trailer within a short time after the vehicle arrives, the consignor or consignee may direct the carrier to "spot" the trailer by putting it at a designated location.[6] The carrier then detaches the tractor and leaves the trailer in the consignee's possession pending loading or unloading. The new rule provides that the consignor or consignee has the obligation of moving the trailer within the holding yard (Pet. App. 166a). The carrier is responsible only for the transportation to the place of "spotting," until it is called to pick up the trailer for a line-haul (or, in case of unloading, the unloaded trailer).

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[5]If the consignor or consignee is ready to load or unload the vehicle, or will be ready within a short time, he would direct the power unit to remain with the trailer. The rules for detention of vehicles with power then would apply.

[6]The full definition of "spotting" is (49 C.F.R. 1307.35(e)(2)(2)(f)):

> * * * the placing of a trailer at a specific site designated by consignor, consignee, or other party designated by them, detaching the trailer, and leaving the trailer in full possession of consignor, consignee, or other designated party unattended by carrier's employee and unaccompanied by power unit. Carrier will not move the trailer until such time as it has received notification, pursuant to section 3, that the trailer is ready for pickup at any site on premises. Consignor, consignee, or other designated party may shift the spotted trailer with its own power units at its own expense and risk for the purpose of loading or unloading.
>
> Empty trailers placed at the premises of consignor without specific request are not spotted until the carrier receives a consignor's request and places a trailer for spotting. Movement of the trailer from the consignor's premises to the specific site for spotting shall be the obligation of the carrier, and free time shall accrue as provided in section 3.

Empty trailers left by a carrier at a holding yard without specific request from the shipper are not considered to be "spotted," because the shipper has not designated the location where the trailer has been left. In such instances, section (2)(2)(f) provides that the carrier must shift the empty trailers to a site designated by the consignor (Pet. App. 142a).

The new rules provide that carriers and shippers must enter into agreements concerning schedules for the arrival of vehicles (Pet. App. 156a, 160a). These schedules will enable shippers to plan their loading and unloading to take best advantage of their facilities, and thus will enable carriers to hold detention charges to a minimum (*id.* at 44a).

Under the new rules, detention charges do not apply when trailers are placed in holding yards without a specific designation of place, usually for the convenience of the carrier. But when the shipper detains a vehicle with power, it receives between two and six hours of free time and must pay $18 per hour thereafter, and when the shipper detains a trailer without power, it receives 24 hours of free time and must pay between $25 and $50 per day thereafter. If a shipper desires a carrier to perform "shuttling" services after spotting, the shipper must pay an additional charge (Pet. App. 139a).

2. The Commission concluded that a uniform national rule was necessary because "[d]etention rules, under the guise of flexibility, can provide a fertile source for preferences and other unlawful practices. Without a uniform rule carriers will continuously be tempted or pressured either to interpret provisions of the rules or develop preferential exceptions to the rules in ways most conducive to the maintenance of good relations with influential shippers, to the expense of small shippers" (Pet. App. 33a-34a). The Commission buttressed its conclusion with a recitation of some of the arbitrary treatments and exceptions that had developed under the existing system (*id.* at 28a-33a). The Commission also

concluded that a uniform rule would be easier to enforce (*id.* at 34a) and would decrease the amount of detention, thus making more equipment available for transportation (*id.* at 34a-35a). Although the decision to create uniform rates and practices necessarily caused many changes of the circumstances of individual shippers and carriers, the Commission concluded that "the benefits of uniformity outweigh any minor instances of charges which are not perfectly tuned to the precise needs of all parties" (*id.* at 137a).

The Commission responded to an argument that the detention charges should be cost-justified by stating that "detention charges must have a penalty element in order to achieve their goal of greater vehicle utilization" (Pet. App. 138a). The Commission answered an argument that carriers have a "traditional" duty to shuttle trailers within a holding yard by pointing out that this practice was not universal, and that differences in carrier shuttling were among the forms of preference and unequal treatment that it sought to eliminate (*id.* at 139a-140a). The Commission pointed out, moreover, that the factors creating delay are usually within the control of the shipper, so that efficient use of trailers will best be achieved if the shipper is required to pay the carrier on account of delay; the shipper then can decide whether it is less expensive to reduce the delay (by building additional transfer facilities or by more careful scheduling, for example) or to tolerate the delay (when new facilities would be more expensive than the detention charges). In either event, the rules place the cost of delay on the parties most able to affect the length of delay and to make business judgments about how much delay is efficient. See Pet. App. 140a-142a.

The Commission responded to the contention that the burden of proving the cause of delay should be on the carrier, rather than on the shipper, by stating that "the

very nature of the problem precludes a solution totally satisfactory to both shipper and carrier" (Pet. App. 145a). The allocation of the burden to the shipper is appropriate, the Commission reasoned, because the scheduling rules that it had adopted would permit the shipper to "be in a position to document" any delays in arrival, any special problems in unloading or loading, and the carriers' general record of timeliness (*ibid.*).

3. The court of appeals affirmed. It concluded that "there is a rational basis for the ICC conclusions" (Pet. App. 6a), that the "Commission's findings and conclusions 'are rationally supported[,]' [a]nd to the extent that evidence was required in the record to support the contested conclusions, we find it sufficient to sustain the exercise of the ICC's rulemaking authority" (*id.* at 11a).

ARGUMENT

1. Petitioners' principal argument is that the court of appeals applied a standard of review that was too deferential to the Commission. Petitioners are wrong. The court of appeals quoted at length from (Pet. App. 9a-10a), and applied, the standards of *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742. Since petitioners do not argue that the standard articulated in *Allegheny-Ludlum* is incorrect, it must follow that the standard applied by the court of appeals was proper.

Petitioners seize on the court of appeals' statement that "[w]ere we able to utilize a more expansive notion of what is 'arbitrary, capricious, and an abuse of discretion', we might have been receptive to some of the arguments presented by the petitioners" (Pet. App. 10a). But the court did not imply that it was employing a standard of review *less* searching than that required by *Allegheny-Ludlum*; to the contrary, the court implied that only by employing a standard of review "more expansive" than

that approved by this Court could it agree with petitioners. As we understand the court of appeals, it would have preferred to substitute its judgment in some regards for the judgment of the Commission, but it properly declined to do so, recognizing that a court is not entitled to substitute its judgment for that of the agency. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, No. 76-419, decided April 3, 1978, slip op. 25.

The argument (Jones Pet. 16, 18; National Industrial Traffic League ("NITL") Pet. 11-15; Ford Pet. 13-15) that the court of appeals did not conduct a meaningful review of the Commission's decision is insubstantial. Although the court did not write an extensive opinion, a court need not do so simply to prove that it has discharged its judicial function. Cf. *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n. 4; *United States* v. *Baynes*, 548 F. 2d 481 (C.A. 3), certiorari denied, 431 U.S. 939. The court stated that it had examined the record, considered the arguments, and concluded that the new rules are "rationally supported" (Pet. App. 11a). For the reasons that we discuss below, the court's conclusion is correct.

2. None of the petitioners argues that uniform detention rules are unnecessary. Indeed, as the Commission remarked (Pet. App. 136a), the "need for uniform nationwide rules * * * seems almost universally accepted by the parties to this proceeding."[7] Petitioners argue, instead, that the rules are defective in several respects. But it was inevitable that the Commission would be unable to please everyone; it could do no better than to arrive at a

[7]Petitioner Ford now asserts (Pet. 5) that the nonuniform practices were satisfactory. It took the contrary position before the Commission, arguing there for uniform detention rules (J.A. 33). ("J.A." refers to the appendix in the court of appeals.)

reasonable accommodation of the many disparate interests. We believe that the record indicates that the Commission has done so.

a. All petitioners contend that the Commission should not have defined "spotting" of trailers in a way that requires the consignor or consignee either to be responsible for the movement of trailers within a holding area or to pay a carrier for providing a "shuttling" service (Jones Pet. 19-24; NITL Pet. 18-20; Ford Pet. 9). The Commission thoroughly discussed the considerations supporting its rule—including the need to create an incentive to avoid wasteful delays during detention—in the course of rejecting this contention (Pet. App. 46a, 71a-74a, 139a-140a, 165a-169a). We rely on the Commission's opinion.

The Commission's rules do not alter traditional concepts of pickup and delivery or eliminate a service that has previously been provided under the line-haul rate structure (Pet. App. 73a, 139a, 140a). The line-haul rates of a motor common carrier always have included only one pickup and one delivery.[8] *Rules and Rates, O.K. Transfer & Storage Co.*, 18 M.C.C. 699, 702; *Montgomery Ward & Co.* v. *Northern Pacific Terminal Co.*, 128 F. Supp. 475,

[8]*Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 816-618, on which petitioner Ford relies (Pet. 19), does not assist it. This Court held that the Commission must express a reason for permitting railroads to reduce their services without reducing their rates. Here, by contrast, the new rules do not reduce service. Many shippers already move trailers to their docks at their own expense.

491 (D. Ore.).[9] Carriers have not been required to shuttle trailers within yards. Delivery is accomplished when a trailer is left in the consignee's possession. *General Electric Co.* v. *Acme Fast Freight, Inc.*, 324 F. Supp. 1079, 1083 (D. Md.), affirmed, 440 F. 2d 412 (C.A. 4); *Republic Carloading and Distributing Co.* v. *Missouri Pacific Railroad Co.*, 302 F. 2d 381, 386 (C.A. 8). A trailer is, by definition, delivered when spotted, because "spotting" means leaving a trailer in the full possession of the consignor or consignee at a site designated by him.

The Commission considered the effect of the new spotting rule on the use of holding yards and found that "the prescribed rules need not eliminate bullpen and holding yard operations as petitioners imply" (Pet. App. 168a-169a). The new rules simply mean that only shippers that use shuttle operations need bear the cost of shuttling. Other shippers that do not require repeated trailer movements will achieve a relatively lower cost. Petitioner

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[9]Notwithstanding petitioner Jones's assertion (Pet. 23), *Carrier Switching at Industrial Plants in the East*, 294 I.C.C. 159, 167, does not hold that switching charges are included in motor carriers' line-haul rates. The railroad switching practices adopted in that case do not pertain to motor carriers and are based on completely different transportation conditions. The physical nature of rail operations, including the use of one locomotive to haul numerous cars, make rail switching unavoidable. Motor carrier trailer shifting, on the other hand, is required only if the shipper chooses to have the carrier leave a trailer at a site other than the loading dock, and large shippers can perform their own shifting if they choose to establish holding yards.

Hygrade Food Products Corp. Terminal Allowance, 306 I.C.C. 557, 559, is similarly not in point. The case merely indicates that motor carriers spot trailers *at points within the plant area* without charge under the line-haul rates. Under the new detention rules, the motor carrier will continue to spot trailers at any point in the consignor's or consignee's plant area under the line-haul rate. Only subsequent movement of spotted trailers by the carrier will be charged to the consignor or consignee.

Ford has acknowledged that a shipper's volume of freight must be substantial to warrant the use of holding yards (J.A. 57), and there is no reason why small shippers (who do not use holding yards) should pay the same total shipping charges as larger ones, like Ford, who do. Yet that is what would happen if the line-haul rate also included costs attributable to shuttling within holding yards (Pet. App. 169a).

b. Contrary to petitioner Jones's assertions (Pet. 10-13), the Commission's reports are internally consistent and the final (third) report does not conflict with the new rules. Petitioner Jones quotes (Pet. 10) a passage from the Commission's third report discussing the consignee's responsibility for the subsequent movement of a trailer that has been spotted and contends that this contradicts the rule. But the passage does not purport to recapitulate the entire spotting definition and must be read in conjunction with it. The quoted language, which states in part that "the carriers' line-haul obligation ends when a loaded trailer is dropped in the consignee's holding yard," does not supersede the definition of "spotting" contained in the new rules.

c. Petitioner NITL's arguments notwithstanding (Pet. 15-17), the level of detention charges set by the uniform rules is reasonable. One of the best tests of the reasonableness of a rate is to compare it to rates on like traffic in the same general territory. *Western Paper Makers' Chemical Co.* v. *United States*, 271 U.S. 268, 271; *Emery Common Carrier Rates—Various Commodities*, 326 I.C.C. 415, 420. Here, the Commission adopted detention charges that are well within the range of those currently published by the major rate bureaus

(Pet. App. 60a).[10] Moreover, the Commission has indicated its readiness to revise the level of detention charges if future events demonstrate that it would be in the public interest to do so (Pet. App. 60a-61a, 138a).[11]

d. Based on its experience in administering uniform detention rules in the Middle Atlantic and New England regions, which revealed a tendency by shippers to raise spurious claims that delays were carrier-caused, the Commission reasonably concluded that detention abuses can best be minimized by placing the burden on shippers to show that a given delay is attributable to the carrier and should not trigger detention charges (Pet. App. 62a). Petitioners' challenge to this allocation of burdens is unwarranted. The shippers have the best access to information on causes of delay (especially given the new recordkeeping and scheduling rules) and thus should bear the burden of documenting instances of carrier delay (*id.* at 145a).[12]

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[10]Petitioner NITL inaccurately contends (Pet. 16) that the Commission found that existing detention charges bear no relation to carrier costs. To the contrary, the Commission found that regional detention charges reflect multi-regional costs (Pet. App. 57a). Thus the regional charges are a useful model for the creation of nationwide charges.

[11]Petitioner Jones asserts (Pet. 12) that spotted trailers will be subject to the detention charges for vehicles with power. That is incorrect. The language Jones quotes from the Commission's first report is no longer important, because the spotting definition was revised in the third report (Pet. App. 166a, 167a). It is now clear that spotted trailers are dealt with as vehicles without power.

[12]Section 3 of the new rules provides shippers with the option of including arrival and completion times and non-working periods on carrier detention records (Pet. App. 62a-63a, 145a). This gives shippers a measure of control that does not currently exist and puts them in an excellent position to document instances in which delay is attributable to the carrier.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' REPLY TO BRIEF OF FEDERAL RESPONDENTS

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ARGUMENT

The entire basis for the actions of the Interstate Commerce Commission here under review has been seriously called into question by the Commission's attempt on brief to explain away a patent inconsistency

[1] The Federal respondents submitted a combined brief in opposition to petitions for certiorari in Nos. 77-1162, 77

in the decisions below. At page 11, the Commission has effectively conceded that there is a clear contradiction between its statement in the reports below that "the carriers' line-haul obligation ends when a loaded trailer is dropped in the consignee's holding yard" (73a, 139a, 168a) and the specific definition of spotting adopted by these reports, 49 C.F.R. 1307.35(e)(2)(2)(f). Because holding yards are operated by carriers or their agents, petitioners have urged that trailers parked in holding yards cannot be considered to be "in full possession of the *** consignee *** unattended by carrier's employee," as required to come within the definition of spotting in Section 2(f). (Pet. 10-13, 20) However, the language quoted above, embracing all three Commission reports, finds that all loaded trailers dropped in holding yards are spotted, regardless of the fact of the carrier's continuing control over the trailers.

On brief, the Commission at no point argues that the adopting language quoted above is consistent with the spotting definition in Section 2(f). Rather, the Commission now argues at page 11 that it never intended for the two provisions to be consistent. According to the Commission, the quoted language from the reports "does not purport to recapitulate the entire spotting definition," and should not be read as superseding it. In other words, the Commission does not argue that the spotting definition and the adopting language are consistent, but rather takes the view that the Court should resolve any inconsistencies in favor of the spotting definition.

Taken literally, the position advanced at page 11 would consider "a loaded trailer dropped in the consignee's holding yard" to be spotted only if the holding yard was completely unattended by carrier

employees. If carrier employees were in attendance, the trailer would not be deemed spotted, the carrier's line-haul obligation would not cease, and delivery of the trailer to the point of unloading would be performed without extra charge. Thus, the very practices which the Commission criticized so vehemently in its reports below could continue unabated under the interpretation advanced by its counsel on brief.

The sheer ludicrousness of this result supports petitioners' contention that the Commission's actions in this matter have been arbitrary, capricious, and lacking in reasoned basis. The Commission brief is obviously grasping for any possible method of rationalizing the patent inconsistency between the proposed rule defining spotting and the reports issued in support of its adoption. The quoted language in these adopting reports was in no way characterized as only a partial description of the spotting definition, as urged by the Commission at page 11. The Commission reports show a clear intent to terminate all line-haul service upon placement of a loaded trailer in a consignee holding yard, yet inexplicably the proposed rule did not achieve this goal. The convoluted construction urged by the Commission at page 11 in no way resolves the conflict between the rule and the adopting reports.

Similar attempts to find reasoned bases for action where none exist are found elsewhere in the Commission brief. For example, at page 12, footnote 11. the Commission claims that contradictory language in the first and second reports dealing with detention with power provisions was rendered inapplicable "because the spotting definition was revised in the third report." In fact, the third report revisions bore no relation to

detention with power. (166-67a)[2] In their petition for certiorari, these petitioners urged the Court to find the decisions below to be arbitrary and capricious due to the internal inconsistencies and lack of reasoned basis for the Commission's action. The Commission's brief is little more than an effort to supply reasoned bases for this action where none exist, or to actually modify the Commission's decision through statements on brief. Such an effort clearly must be rejected. *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943); *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-69 (1962).

CONCLUSION

For the reasons stated above, as well as those stated previously, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[2] Similarly, at page 9, the brief states that the Commission reports discussed "the need to create an incentive to avoid wasteful delays during detention," but fails to cite any record authority or otherwise explain the completely erroneous finding in the third report (169a) that trailers parked in holding yards are not presently subject to detention penalty provisions. Compare, Pet. 13,22.

see

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